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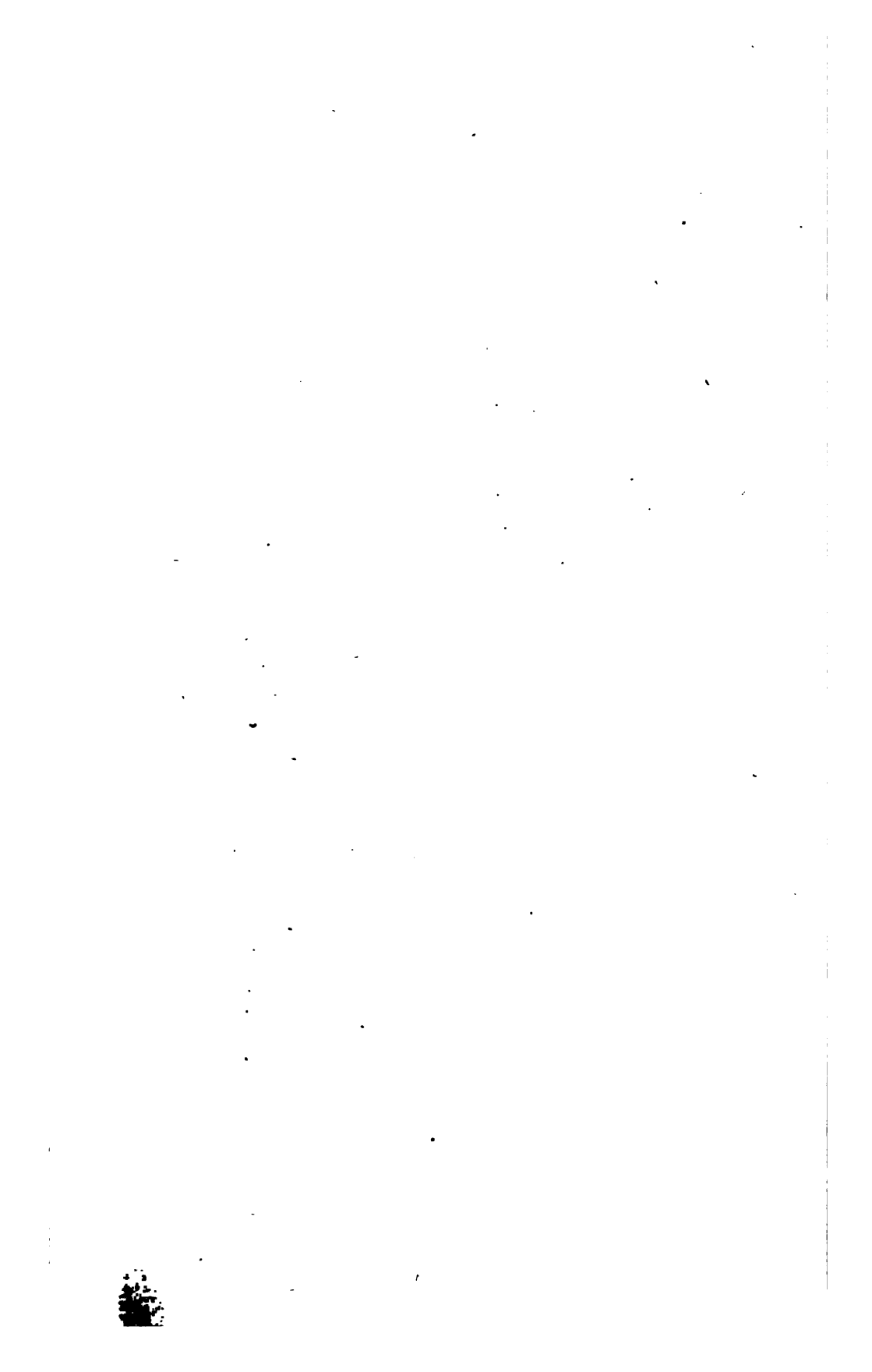


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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

A circular stamp with a scalloped border. The word "HARVARD" is arched across the top, "LAW SCHOOL" is arched across the middle, and "LIBRARY." is arched across the bottom.


By THOMAS C. CURRY
Counsellor at Law,
AND REPORTER OF THE DECISIONS OF THE SUPREME COURT.

VOLUME XIII.

NEW-ORLEANS:

PRINTED BY BENJAMIN LEVY, CHARTRÉS-STREET.

1839.

 There are about forty cases remaining over, reported, but which could not be included in this volume, it having already attained the size specified by law and the contract with the public printer. They will appear in the beginning of the next volume.

JUDGES OF THE SUPREME COURT.

The HON. HENRY A. BULLARD and the HON. HENRY CARLETON, resigned their seats in the Supreme Court, the beginning of February, 1839.

On the 4th of March, 1839, JUDGES ROST and EUSTIS were appointed to fill the vacant offices.

During nearly all the period embraced by this volume, beginning at page 87, the court consisted of the following judges:

HON. FRANÇOIS XAVIER MARTIN.

" PIERRE ADOLPHE ROST,

" GEORGE EUSTIS.

CORRECTIONS.

The following *point*, decided in the case of *Ellis vs. Prevost et al.*, page 237, was omitted in the head notes, but is included in the index under the head of "Codes."

"The Code of Practice was framed exclusively with a view to judicial proceedings, and its provisions on the subject of *general laws*, do not necessarily repeal those of the Louisiana Code that are contrary to or inconsistent with them."

In the same case, page 236, three lines from the bottom, the reader will omit the three following words: "while they contained;" and read the sentence thus:

"They were written by lawyers, who mixed with the positive legislation *definitions* seldom accurate, and points of *doctrine* always unnecessary."

In the case of *Municipality No. Two vs. Curell*, page 320, read "Benjamin, *contra*;" instead of "Haines."

In the case of *Pilie vs. Stewart*, page 365, in *Benjamin's* points, ten lines from the top, read, "he had *not* the right," &c.

In page 295, last line in the first point or paragraph, read, "special power of attorney;" instead of "verbal."

At page 334, top line of the first head note, read, "parole evidence is *admissible* to prove a boundary line, &c. in support of a plea of prescription;" instead of "is *inadmissible*."

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REPORTS
 OF
CASES ARGUED AND DETERMINED
 IN
THE SUPREME COURT
 OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT.
NEW-ORLEANS, DECEMBER, 1838.

CLAGUE'S WIDOW vs. CLAGUE'S EXECUTORS.*

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An additional sum for the fee of the attorney of an estate, will not be allowed, when there is no evidence of the nature and value of the services for which this fee is claimed. It is not sufficient to urge that the sum claimed is a moderate fee.

Where the executors refused to deliver up the estate of the testator to the widow, as natural tutrix of the minor children and heirs, on account of the danger which they and the testator apprehended of the waste and dilapidation she might occasion the estate: *Held*, that in case of any real danger, the only legal way to avert it, is by provoking the removal or destitution of the tutrix.

The widow as tutrix of her children, who are forced heirs of the testator, can at any time take the *seisin* from the testamentary executors on offering them a sufficient sum to pay the moveable legacies.

* The opinion of the court in this case was read at the May Term, 1838, but was suspended by an application for a re-hearing until this term.

EASTERN DIST.
December, 1838.

CLAGUE'S WID'W
vs.
CLAGUE'S EX'RS.

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48	163
48	181
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EASTERN DIST.
December, 1838.

CLAGUE'S WID'W
vs.
CLAGUE'S EX'RS.

A disposition by will, in which the property of the estate is to remain in the hands of the executors, until the testator's children or heirs arrive at the age of majority, cannot be distinguished from one that would authorize the executors to keep and preserve it for, and return the estate to them, which is a *fidei commissum*, or trust, and is forbidden by law.

The testator has not the power to extend the period of the executorship to more than one year, nor to direct that the estate should remain in the hands of the executors afterwards, or that they should keep and preserve it for another or others, when there are forced heirs who are present.

The plaintiff, Marie Delphine Justin Laroche, widow of the late Richard Clague, and natural tutrix of the minor children, Richard, Edward and Charles Clague, instituted suit in the Court of Probates against J. & L. Garnier and Thomas Barrett, Esqs., executors of the last will and testament of Richard Clague, deceased, demanding of them to be put in possession of the whole amount of the inventory of the estate of her deceased husband, after deducting the legal fees and charges attending the settlement thereof. She prays that the executors be ordered to render an account of their administration, and required to pay over whatever balance may remain in their hands, after payment of all the legal charges.

The defendants denied the right of the plaintiff to demand possession of the estate, for the following reasons :

1. That by the will the executors were required to act as such, until the majority of all three of the minor children, and to retain the funds of the estate until that period for their benefit.

2. That they are authorized to invest the proceeds of said estate in the most advantageous manner for the benefit of said minors, and in fact, to act as their guardians and curators until they arrive at the age of majority. That these legacies having been made conditionally, the conditions cannot be violated by the tutrix of the minors, requiring the entire estate to be delivered into her hands, when it was clearly the interest of the testator to keep it from her ; and that it was made their duty, and they were about to invest the proceeds of the estate in real estate producing a revenue.

3. The plaintiff cannot claim any of the property in the inventory as her share of the community, which was dissolved by a judgment of separation from bed and board, pronounced in 1830, between her and her late husband, and she tacitly renounced all her right thereto by not claiming any part thereof within three months afterwards. They pray that her demand be rejected.

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Upon these pleadings and issues the probate judge decided that, the wife, being the survivor of her late husband, became natural tutrix of her minor children, and is thereby entitled to the administration of their property. The executors were ordered to account within ten days to the plaintiff.

The executors prayed an appeal from this order or judgment, which was refused by the judge; he being of opinion that an appeal did not lie.

They then rendered an account showing a balance of thirty-six thousand seven hundred and sixty-nine dollars fifty-six cents in their hands, and prayed the court that it remain in their possession according to the terms of the will, and that their account be homologated.

The plaintiff made opposition to an item of one thousand dollars in the account allowed the counsel for the executors, as a fee for his services, on the ground that it was too high, and not warranted by law for the service rendered. She prays that it be reduced to five hundred dollars, and that the executors be ordered to pay over to her the balance in their hands.

On hearing the parties, the judge of probates decreed that the fee of the counsel for the executors be reduced to the sum of five hundred dollars, there being no evidence that the services rendered are worth more; and that the sum remaining in the hands of the executors be carried to the account of the plaintiff, as tutrix of the minor children and forced heirs of Richard Clague, deceased. The executors appealed.

Cannon, for the plaintiff and appellee, insisted that the fee of the attorney of the estate was properly reduced to the sum

EASTERN DIST. of five hundred dollars. They are not warranted by law or
December, 1838. any evidence in the case for a larger sum. At the end of
CLAGUE'S WID'W the year the executors being *functi officii*, had no further
vs. right to employ counsel at the expense of the estate.
CLAGUE'S EX'RS.

2. On the dissolution of the marriage by the death of either party, the tutorship of the minor children belongs to the survivor. The testator cannot by will appoint other persons as tutors under the fictitious names of testamentary executors, and enable them to retain the property of the minors under their control for twelve or thirteen years, without even giving security or paying interest. Louisiana Code, 268. Article 1664 gives to the heirs the *seizin* of all their estate through their tutrix.

L. Janin, for the appellants.

The fee of the counsel to the estate was properly charged. The plaintiff's counsel mistakes the nature of this charge and the ground upon which it was made. The executors being called on to render an account, put down the counsel's fee for services already rendered and which were to be hereafter rendered in the general business of the estate, and in the present suit, until the final liquidation of the estate. In making up their account, the executors could not reserve this charge until all these services had been rendered.

2. The executors were bound to execute the will as long as it continues in force; and even if it shall be set aside, it being an act of the testator, the estate must pay the expenses incurred by the executors in their administration under the will. *Sterlin's Heirs vs. Gros*, 5 Louisiana Reports, 107.

Evidence of the *nature and extent* (not of the value) of the services rendered by the counsel for the estate, has been produced, and shows the extensive legal business that has been performed by him. It consists in the proceedings in the estate had in the Court of Probates, and also in this suit, which are all before the court and speak for themselves; besides this, he had many consultations with the executors, and particularly one of them, at various times, about the

estate; and likewise drew up a memorial to the United States government in relation to property of the estate in France, and gave advice concerning the administration of it, &c.

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4. The grounds relied on for sustaining the will of the deceased, Richard Clague, and carrying into effect its dispositions and provisions, are stated in the answer to the plaintiff's demand, and need not be here recapitulated.

Martin, J., delivered the opinion of the court.

The plaintiff, in her own right and as tutrix of her minor children, claims from the executors of her husband an account of their executorship, and a delivery of the estate into her hands.

The defendants answered, that the plaintiff is not entitled to any part of the estate in her own right, because a separation of bed and board took place between the plaintiff and her husband, some time previous to his death; and that she is not entitled to any part of the estate in the right of her children, because the testator made his universal legatees, and appointed the defendants his executors, and directed that their executorship should continue until the said children became of age, and appointed the defendants tutors and curators of the said children, and required them to invest the net proceeds of his estate for their benefit, in productive real estate.

The executors filed their account, showing a balance of thirty-six thousand seven hundred and sixty-nine dollars and fifty-six cents in their hands.

The plaintiff objected to an item of one thousand dollars, charged as a fee paid to the attorney of the estate, of which she complains as extravagant; and it was, on her motion, reduced to five hundred dollars. The balance of the account was ordered to be carried to the credit of the plaintiff, as tutrix of her minor children; the account, thus amended, was ordered to be homologated. The defendants appealed.

It has been contended in this court that the fee of the attorney was moderate, and ought not to have been reduced.

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CLAGUE'S WID'W
vs.
CLAGUE'S EX'RS.

An additional sum for the fee of the attorney of an estate, will not be allowed when there is no evidence of the nature and value of the services for which this fee is claimed. It is not sufficient to urge that the sum claimed is a moderate fee.

Where the executors refused to deliver up the estate of the testator to the widow, as natural tutrix of the minor children and heirs, on account of the danger which they and the testator apprehended of the waste and dilapidation she might occasion the estate: *Held*, that in case of any real danger, the only legal means to avert it, was by provoking the removal or destitution of the tutrix.

The widow as tutrix of her children, who are forced heirs of the testator, can at any time take the *seizin* from the testamentary executors, on offering them a sufficient sum to pay the moveable legacies.

It appears that the executors paid him five hundred dollars only; and that his claim for more, though not disallowed, was not paid; the executors, therefore, could not be allowed a credit for more than they had actually paid; and there is no evidence in the record of the nature and value of these services.

One of the executors, who is also the under tutor of the children, in both these capacities has joined his co-defendants in urging the danger which they conceived to exist, and which they suggest their testator apprehended of the waste and dilapidation of his estate by the widow. Of this danger the record does not offer the least proof, and if it does really exist, there are legal means to arrest it, to wit: by provoking the removal or destitution of the tutrix. *Louisiana Code, 323.*

The article 1664, authorizes the widow, as tutrix of her children, the forced heirs of the testator, to take at any time the *seizin* from the testamentary executors, on offering them a sufficient sum to pay the moveable legacies. In the present case, the minors have a right, not only to that portion of the estate to which they are forced heirs, but also to all the rest as testamentary heirs; they are, therefore, dispensed from offering to the executors the sum necessary for the payment of that which they claim as testamentary heirs.

The Louisiana Code, article 1507, provides, that "every disposition, by which the donee, the heir or legatee is charged to preserve for, or to return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee."

A disposition by which the property of the estate is to remain in the hands of the executors, until the majority of the testator's children, one of whom is under ten years of age, cannot be distinguished from one that would authorize the executors to preserve for, or to return the estate to them at the period of the majority of the children and heirs.

Such a disposition is indeed a *fidei commissum* or trust, which the law forbids. *Louisiana Code, 1507.*

The executorship expires at the end of the year, commencing from the moment at which he had the *seizin* of the

estate. See *Louisiana Code*, article 1666. The judge may continue it if the absent heirs have not appeared, or have not claimed their rights, on obliging him to give security for the sum or effects remaining in his hands, article 1667; but the testator has not the power to extend the period of the executorship to more than one year, nor to direct that the estate should remain in the hands of his executors afterwards, nor that they should preserve it for another or others. If the will directed him to do so, the disposition is null as we have said before, in which case, it is as if it was not written, and the property it embraces vests in the children as forced or legal heirs, for the portion of the estate of which the testator had the legal disposal of.

The testator, leaving three children, had a right to dispose absolutely of one third of his property. He, therefore, had the right to direct that his executors should invest that third in stock or productive real estate, for the benefit of his children; and the Court of Probates, in our opinion, erred in decreeing the payment of the balance in their hands to the tutrix. The intention of the testator must be fulfilled in every part of it which does not violate the law, and the executors must invest for the children, according to the will, that portion of the estate which the law left at the absolute disposal of the testator.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be annulled, avoided, and reversed; that the plaintiff, in her capacity of tutrix of her's and the testator's children, recover from the defendants the sum of twenty-four thousand eight hundred and forty-six dollars thirty-seven and one-third cents; and it is ordered and decreed, that no execution shall issue until after the expiration of sixty days from the day on which this judgment shall become final, for one-third of the above sum; nor after that period, if before its expiration the defendants shall have invested the said third in stock or productive real estate to the satisfaction of the judge of probates, in the name of the said children, and deliver the titles or evidence of such

EASTERN DIST.
December, 1838.

CLASUR'S WID'W
VS.

CLASUR'S EX'RS.

A disposition by will, in which the property of the estate is to remain in the hands of the executors until the testator's children or heirs arrive at the age of majority, cannot be distinguished from one that would authorize the executors to keep and preserve it for, and return the estate to them; and is a *fidei commissum* or trust, which is forbidden by law.

The testator has not the power to extend the period of the executorship to more than one year, nor to direct that the estate should remain in the hands of the executors afterwards, or that they should keep and preserve it for another or others, when there are forced heirs who are present.

EASTERN DIST. investment; to their tutrix; costs in both courts to be paid out
December, 1838. of the sum thus recovered.

ANDRY
vs.
GUYOL ET AL.

ANDRY vs. GUYOL ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

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 106 599

According to the provisions of the Louisiana Code, article 3216, No. 3, those who have supplied the owner with materials for the construction or repair of an edifice, &c. are entitled to a privilege on the edifice or work constructed, for the price of such materials.

So, where the vendee of a lot of ground received materials from a third person, for the erection of a house on it: *Held*, that the material man was entitled to receive the price of such materials, by privilege over the vendor of the lot, to be paid from the price of the house in the hands of the sheriff, which was sold with the lot.

This case commenced by order of seizure and sale. The plaintiff sold, and conveyed to the defendant, Guyol, a lot of ground, in the city of New-Orleans, by public act, dated the 11th of May, 1832, for the sum of ten thousand eight hundred dollars, payable in four equal annual instalments from the date of sale, with mortgage retained on the premises until complete payment of the price.

On the 25th of September, 1834, the three first instalments having become due and remaining unpaid, the plaintiff filed his petition, and took out an order of seizure and sale for the entire sum due and to become due, and proceeded to sell the mortgaged premises. In the meantime the purchaser had built a house on the ground originally sold.

John F. Miller intervened as a third opponent, and claimed a special privilege on the proceeds of the sale in the hands of the sheriff, for the sum of one thousand two hundred

and fifty-one dollars sixty-seven cents, being for lumber and materials furnished to the defendant for building the house, which was sold by the sheriff, with the lot of ground. Experts were appointed to appraise the relative value of the parcel of ground, with the improvements and the buildings, such as they were at the time of the sale. The experts reported thirteen hundred dollars worth of materials in the house; and also the relative value of the ground, &c.

On this report and the evidence of the claim set up by Miller in opposition, the district judge gave judgment in his favor for the sum of twelve hundred and forty-eight dollars, as a privileged debt on the price of the house in the sheriff's hands.

The plaintiff, after an unsuccessful attempt to obtain a new trial, appealed.

De Armas, for the appellant.

Roselius, for the appellee.

Carleton, J., delivered the opinion of the court.

The plaintiff obtained an order for the seizure and sale of a lot of ground sold to the defendant, who failed to pay the price at the time stipulated by his contract. During his possession, the vendee built a house on the premises, of materials furnished by J. F. Miller. While the proceeds of sale were yet in the hands of the sheriff, Miller intervened, and claimed the value of these materials as a privileged debt. The court below decreed in his favor, and the plaintiff appealed.

The case was submitted to this court without argument or brief on either side.

We have carefully examined the record, and are unable to perceive any error in the judgment of the District Court. *Louisiana Code*, articles 3234-5-6, and 3216.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.
December, 1838.

ANDREY
VS.
GUYOL ET AL.

According to the provisions of the Louisiana Code, art. 3216 No. 3, those who have supplied the owner with materials for the construction or repair of an edifice, &c. are entitled to a privilege on the edifice or work constructed, for the price of such material.

So, where the vendee of a lot of ground received materials from a third person for the erection of a house on it: *Held*, that the material man was entitled to receive the price of such materials by privilege over the vendor of the lots, to be paid from the price of the house in the hands of the sheriff, which was sold with the lot.

EASTERN DIST.
December, 1838.

SLOCOME ET AL. *vs.* BOWIE ET AL.

SLOCOME ET AL.
vs.
BOWIE ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

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116 213

Where a non-resident is held to bail, but leaves the state before service of the petition is made on him, the suit will be dismissed.

Service of both citation and petition is necessary to bring a party into court to answer; which is not waived by the defendants' exception, pleading a *misnomer*.

This is an action against the drawers of a bill of exchange for one thousand three hundred and ninety-three dollars. The plaintiffs are the payees and holders thereof.

The defendants reside in the state of Arkansas. John J. Bowie, one of the drawers of said bill, was arrested in New-Orleans, at the suit of the plaintiffs, and held to bail. Before any service of petition was made on him, he left the state.

His counsel appeared and filed two exceptions; that he was not properly named in the writ of arrest, and that no copy of the petition had been served on him; and prayed that the suit be dismissed.

These exceptions were overruled, and an answer containing a general denial put in on the merits.

Judgment was finally rendered against all the defendants, as commercial partners *in solido*, for the amount of the sum claimed. The defendant, J. J. Bowie, appealed.

Ives, for the appellant, relied on the cases in 2 *Louisiana Reports*, 170, and 4 *ibid*, 154, in support of his exceptions, that for want of service of the petition on the defendant, the suit must be dismissed.

Clark, contra.

Carleton, J., delivered the opinion of the court.

The defendant, John J. Bowie, was arrested and held to bail at the suit of the plaintiffs, on the 21st January, 1837, and served with citation and a copy of the affidavit upon

which the order of arrest was granted ; but it does not appear that a copy of the petition was ever served upon him, he having left the city on the same day for Arkansas, the place of his residence.

EASTERN DIST.
December, 1838.
SLOCUMB ET AL.
VS.
BOWIE ET AL.

His counsel, on the 27th of the same month, prayed for the dismissal of the petition and rescission of the order of arrest, on filing the following exceptions, viz :

1. Said petition does not set forth the name and residence of John J. Bowie, as required by law ; that his name is not J. J. Bowie.

2. No copy of said petition has ever been served upon said John J. Bowie.

The court overruled the exceptions, and the defendant, John J. Bowie, having plead the general issue, judgment was thereupon rendered against all the defendants, and he appealed.

We think the court erred in overruling the second exception ; for it is a positive provision of law, and a plain dictate of justice, that the defendant should be fully apprised of the cause of action set up by the plaintiff, which cannot be done but by service of a copy of the petition. *Code of Practice, article 178.*

Where a non-resident is held to bail, but leaves the state before service of the petition is made on him, the suit will be dismissed.

The same point was long ago settled by this court in the case of *Wall vs. Wilson*, 2 *Louisiana Reports*, 170, and also in the case of *Zacharie vs. Blandin*, 4 *Louisiana Reports*, 154.

But plaintiffs' counsel insists, that the defendants, by pleading a misnomer, in the first exception, has waived the objection taken in the second. We think differently. Both exceptions were filed at the same time, and it cannot be material which of them was first written on the same paper upon which both are spread.

Service of both the citation and petition is necessary to bring a party into court to answer, who is not waived by the defendants' exception, pleading a misnomer.

Being of opinion that the petition ought to be dismissed, we forbear to examine any other point raised in the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided and reversed, that the petition be dismissed, the plaintiff and appellee paying costs in both courts.

EASTERN DIST.
December, 1838.

BURNS vs. HAYNES ET AL.

BURNS
vs.
HAYNES ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where the defendant was sued on his promissory note, and averred, that
“the plaintiff was not the real and *bona fide* owner, and had no right to
sue”: *Held*, that this is neither a dilatory, declinatory, or peremptory
exception, but is considered an answer to the merits.

A judgment will be reversed for not containing the reasons upon which it
is founded, as required by the constitution; but when the record ena-
bles the court to examine the case on its merits, it will render such judg-
ment as ought to have been given by the court below.

The possession of a note endorsed in blank is *prima facie* evidence of
property in the plaintiff, sufficient to throw the burden of proof on the
defendant. When the signature is not denied, the plaintiff is not bound
to prove it.

This is an action against the maker and endorser of a
promissory note, instituted originally in the City Court of
New-Orleans. The note is endorsed in blank by the payee,
and the plaintiff is the holder or endorsee.

The defendant pleaded, as an exception, that the plaintiff
was “not the real and *bona fide* owner of the note sued on,
and had no right to sue.”

The cause was set for trial on a particular day, and the
defendant notified thereof; but when the case was called for
trial, the defendant’s counsel objected, on the ground that by
a rule of court exceptions should be tried on Saturdays only;
and that the point at issue was on the defendant’s exception.
The court overruled the objection, and directed the parties to
proceed to trial, on the ground that the exception was virtu-
ally an answer. The defendant excepted, and from judg-
ment rendered against him appealed to the Parish Court for
the city and parish of New-Orleans.

The Parish Court affirmed the judgment of the City Court,
rendered against the defendant for the amount of the note
sued on; from which he appealed to this court.

Randall, for the plaintiff.

Bartlett, for the defendant.

Carleton, J., delivered the opinion of the court.

This case originated in the City Court, where judgment was rendered against the defendant, Haynes, and being confirmed by the Parish Court, he appealed to this tribunal.

In the City Court, the defendant appeared and plead for exception, that "the plaintiff is not the real and *bona fide* owner of the note on which the suit is brought, and had no right to sue."

The judge of that court considered that plea as an answer to the merits, and refused to hear the parties on the day fixed by rule for the argument of exceptions.

We think the court did not err ; for if it be an exception at all, it is either *dilatory*, *declinatory*, or *peremptory*. It is not dilatory, for its object is not to retard but to defeat the action nor is it declinatory, for no objection is taken to the competency of the court ; nor is it said that another suit is pending between the same parties for the same cause of action, before a court of concurrent jurisdiction : nor is it pretended the action is extinguished, and, therefore, it cannot be a peremptory exception.

But the defendant contends, that the judgment of the Parish Court must be reversed, for not containing the reasons upon which it is founded : we assent to this position. The constitution is imperative ; and the judgment must, therefore, be reversed.

But this court have ruled, that whenever the record would enable them to examine into the merits of a cause, they would render such judgment as ought to have been given in the court below. 5 *Martin*, §201.

We think with the judge of the City Court, that possession of the note sued on, under an endorsement in blank, was *prima facie* evidence of property in the plaintiff, and threw the burden of proof to the contrary, on the defendant ; and the signatures to the note not being denied, the plaintiff was not bound to prove them.

EASTERN DIST.
December, 1838.

BURNS
VS.
HAYNES ET AL.

Where the defendant was sued on his promissory note, and averred that "the plaintiff was not the real and *bona fide* owner and had no right to sue:" Held, that this is neither a dilatory, declinatory or peremptory exception, but is considered an answer to the merits.

A judgment will be reversed for not containing the reasons upon which it is founded, as required by the constitution ; but when the record will enable the court to examine the case on its merits, it will render such judgment as ought to have been given by the court below.

The possession of a note endorsed in blank is *prima facie* evidence of property in the plaintiff, sufficient to throw the burden of proof on the defendant. When the signature is not denied, the plaintiff is not bound to prove it.

EASTERN DIST.
January, 1839.

GUERIN ET AL.
vs.
BAGNERIES.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Parish Court be avoided and reversed; and, proceeding to render such judgment as ought to have been given by that court, it is further ordered and decreed, that the plaintiff recover of the defendant, Haynes, the sum of four hundred and fifty dollars, with legal interest from 27th February, 1837, until paid, together with three dollars costs of protest, and the costs of suit in the Parish and City Courts, the plaintiff and appellee paying the costs of appeal.

GUERIN ET AL. vs. BAGNERIES.

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

Where the plaintiffs claimed certain slaves under the will of their grandfather, devised to their deceased mother, and a settlement of her estate among the co-heirs by private act; and offered on the trial, these documents in evidence, with proof of the signatures of the heirs and their capacity, and presented a witness to establish the fact that, the slaves were inherited from their mother: *Held*, that proof of the genuineness of the act of settlement, as evidence of a sale or exchange, and of the capacity of the heirs, who are parties to it, must be first made, before evidence be admitted of possession under it.

Evidence of the signatures to the private act of settlement among the co-heirs, and their capacity, was improperly refused by the court, because until its genuineness was shown, its validity could not be examined.

Plaintiffs as heirs, claiming a slave by inheritance and an act of settlement among the co-heirs, should be permitted to show by testimony, that the slave made part of the inheritance under the will of a deceased ancestor, either because it was allotted to the daughter in a settlement of the estate, or born from a slave bequeathed to her.

The father of one of the parties called in warranty by the defendant, is an

incompetent witness to testify on behalf of the plaintiff, under the provisions of the Louisiana Code.

EASTERN DIST.
January, 1859.

The defendant may even place the plaintiff in *duriori casu*, when he exercises a legal right, which is the obvious result of the plaintiff's action. Thus the plaintiffs and defendants in an execution and judgment may be cited in warranty by the purchaser under execution, when he is in danger of eviction.

GUERIN ET AL.
VS.
BAGNERIES.

The plaintiffs, Marie Coralie Guerin, Marie Clementine Guerin and Ovide Guerin, the two last named, being minors and properly represented, are the children of Louis Guerin and Marguerite Chauvin Delery, his late wife, and sue to recover as joint owners the slave woman Celestine, and her daughter Fanny, which they allege they acquired by inheritance from their late mother the said Marguerite. They pray judgment against the defendant for the delivery to them, and possession of said slaves as the true owners thereof; and in the mean time that they be sequestered.

The defendant is in possession, and claims title to those slaves, as purchaser at a marshal's sale, under a judgment and execution in the United States District Court, for the Eastern district of Louisiana, obtained by A. & J. Dennistoun & Co., against François Guerin, Louis Guerin, Edouard Guerin, and Marie Marthé Ainée Bienvenu, wife of E. Guerin, and in which the said slaves were seized and sold, as the property of the defendants in said judgment.

The defendant in this case denies that the plaintiffs have any right or title to said slaves, and prays that their demand be rejected. He further prays that all the persons who are parties to said judgment in the United States Court, both plaintiffs and defendants, be cited in warranty to defend his title, etc.

The warrantors were all brought in, and upon these pleadings and issues, the parties went to trial. *See this case in 9 Louisiana Reports, 471.*

The plaintiffs offered in evidence in support of their title, the will of François Chauvin Delery; the extract from the inventory of his estate; and also two documents, one the marriage contract of Marguerite Chauvin Delery, his daugh-

EASTERN DIST.
January, 1839.

GUERIN ET AL.
vs.
BAGNERIES.

ter, with Louis Guerin, and the other a settlement of her estate by the heirs; and likewise offered to prove the signatures of the heirs and their capacity, with a witness to prove that the slave Celestine, was the slave mentioned in said documents, as advanced to Marguerite C. Delery, wife of Louis Guerin, and was inherited by the plaintiffs from their grand-father, François Chauvin Delery.

This testimony was objected to by the defendants counsel, on the ground that an act under private signature, having no certain date, and never having been registered in this parish, cannot be opposed to third possessors holding in good faith by public title; and that the will does not mention the name of any slave whatever, but refers to a previous donation made by the testator, which is not even alleged to exist. After argument the court rejected all the evidence thus offered, and the plaintiffs took their bill of exceptions.

The plaintiffs also offered Mr. Antoine Bienvenu as a witness, to prove the allegations in the petition, who was objected to on the part of the defendant, on the ground that he was the father of Mrs. Marie Marthé Guerin, called in warranty. It was urged that the daughter of the witness never pretended title to the slave Celestine, although a party to the suit of Dennistoun & Co., and was not bound to warrant her. The court sustained the objection, and stated as a reason, that Mrs. Guerin called in warranty, is shown to be one of the defendants in said suit, against whom judgment was rendered *in solido*. The plaintiffs excepted to the opinion of the court.

Finally, judgment was rendered in favor of the defendant; and also against the plaintiffs for the wages of the slaves during the time they were sequestered. The plaintiffs appealed.

Preston, for the appellants, insisted that the father of one of the warrantors was a competent witness to testify in the case, and that the defendant, who had called the daughter in warranty could not make objection. This is not such a case as comes within the prohibition of the code, disqualifying ascendants from being witnesses for or against descendants. *Louisiana Code, article 2260.*

2. The documents offered in evidence, to show the plaintiffs' title to the slaves, were improperly rejected. This evidence was fairly admissible to show the nature of the claim and title set up by the plaintiffs in their suit. The court erred in rejecting it, and the judgment must, for this cause at least be reversed. See the case of *Robillard vs. Robillard*, 4 *Martin*, 603, 12 *ibid*, 651, 677.

EASTERN DIST.
January, 1839.

GUEBIN ET AL.
vs.
BAGNERIES.

Canon, contra.

Martin, J., delivered the opinion of the court.

Our attention is called to a bill of exceptions, taken by the plaintiffs, and now appellants, who, having offered in evidence the will of Chauvin Delery, under which they claimed, an extract of the inventory of the estate, the marriage contract of the deceased daughter, and a settlement of the estate by the heirs, offered to prove the signatures of the heirs and their capacity, presented a witness to establish that the slave now claimed was inherited from Chauvin Delery, by his grand-daughter, one of the plaintiffs. The testimony was objected to by the defendant, on the ground, that an act under private signature, having no certain date, and not registered, cannot be opposed to third possessors, holding in good faith by public act, and that the will does not mention the name of any slave whatever, but refers to a previous donation, which is not even alleged to exist. The testimony was rejected.

Where the plaintiffs claimed certain slaves under the will of their grand-father, devised to their deceased mother, and a settlement of her estate among the co-heirs by private act, and offered on the trial these documents in evidence, with proof of the signatures of the heirs and their capacity, and presented a witness to establish the fact that the slaves were inherited from their mother: *Held*, that proof of the genuineness of the instruments as evidence of a sale or exchange, and of the capacity of the heirs, who are parties to it, must be first made, before evidence be admitted of possession under it.

There is another bill taken by the same party, to the rejection of a witness offered to support their title, on the ground that he was the father of one of the parties called by the defendant in warranty. The objection being made by the defendant, and not by the daughter of the witness.

I. The plaintiffs have cited the cases of *Robillard vs. Robillard*, 4 *Martin*, 603, 12 *Martin*, 651, 677, which do not appear to assist them much. The Louisiana Code, 2242, provides, that "sales or exchanges of real property and slaves, by instruments made under private signature, are valid against *bona fide* purchasers and creditors, only from the day

Evidence of the signatures to the private act of settlement among the co-heirs, and

EASTERN DIST. on which they are registered in the office of a notary, or
January, 1839. from the time of the actual delivery of the thing sold or
 exchanged."

GURRIN ET AL.
vs.

BAGNERIES.

their capacity
 was improperly
 refused by the
 court, because
 until its genu-
 ineness was
 shown, its vali-
 dity could not
 be examined.

The plaintiffs claimed the slave under the will of the grand-father of one of them, and a settlement of the estate with their co-heirs. This settlement was a conveyance, and perhaps, an exchange, by which she acquired the right of her co-heirs in the slave, as an exchange for her right in the portion of the estate which her co-heirs took. The code speaks of the *validity* of sales and exchanges, against *bona fide* purchasers and creditors. Proof of the *genuineness* of the instruments which are the evidence of such sales or exchanges, and of the capacity of the persons who made them, must be administered, before evidence be introduced of possession under them.

The evidence of the signature and capacity of the heirs, was, in our opinion, improperly refused; as, until the genuineness of the act was shown, its *validity* could not be examined.

Plaintiffs as heirs, claiming a slave by inheritance and an act of settlement among co-heirs, should be permitted to show by testimony, that the slave made part of the inheritance under the will of a deceased ancestor, either because it was allotted to the daughter in a settlement of the estate, or born from a slave bequeathed to her.

The slave was purchased by the defendant, at a sale under a *fi. fa.*; he called in warranty the defendants and plaintiffs in the *fi. fa.*; the latter subsidiarily under the Code of Practice, article 711. 6 *Louisiana Reports*, 737.

II. It is urged, in relation to the other bill of exceptions, that the witness ought to have been received, because the defendant could not have objected to him, if his daughter had not been called in warranty; and the plaintiff cannot be put in *duriori casu*, by the act of the defendant; and that the persons cited in warranty are improperly cited, as they were not vendors.

The Louisiana Code, 2260, provides, that ascendants cannot be witnesses for or against descendants. If the witness's daughter was properly cited, she was a party to the suit, and had an interest in defeating the plaintiffs' claim

against the original defendant. If the objection to an ascendant, as a witness, depended on the bias which his situation created for his descendant, it might be urged, as in the case of an interested witness, that he ought not to be sworn when he came to depose against the descendant. Husband and wife, and ascendants and descendants, are excluded from being witnesses by the same article of our code; and, we believe, for the same reason—sound policy, and the support of morality. It is true, the objection was taken by the defendant, and not by the descendant, who may be supposed to have waived her objection, by not urging it. Notwithstanding this, we believe, that if the party was properly called in warranty, the witness ought not to have been admitted.

If the defendant placed the plaintiff in *duriori casu*, by the citation in warranty, he exercised a legal right, which was the obvious result of the plaintiffs' action.

He is a warrantor, who by his convention, or the operation of the law, is bound to repay the price of the thing sold to the vendee, on his being evicted. There is no difference, in our opinion, between the right of a vendee against his vendor, in a sale, in which there is no stipulation of warranty and his right on the defendant and plaintiff in a *fi. fa.*, when he is evicted from the property purchased at the sheriff's sale, except, perhaps, in the amount to be recovered. In the first case, the law has said, the vendor shall restore the price, etc.; in the other, the parties to the suit in which the *fi. fa.* issued, shall do so. The latter, therefore, being exactly bound as a *quasi* vendor, were properly cited in warranty.

EASTERN DIST.
January, 1839.

GUERIN ET AL.

vs.

BAGNERIES.

The father of one of the parties called in warranty by the defendant, is an incompetent witness to testify on behalf of the plaintiff, under the provisions of the Louisiana Code.

The defendant may even place plaintiff in *duriori casu*, when he exercises a legal right, which is the obvious result of the plaintiff's action. Thus the plaintiffs and defendants in an execution and judgment may be cited in warranty by the purchaser under execution, when he is in danger of eviction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and the case remanded for further proceedings, with directions to the judge to permit the plaintiff to prove the signature and capacity of the heirs, in the settlement of the estate of the deceased, and to establish by testimony that the slave Celestine was inherited by one of the plaintiffs, from her grand-father; the defendants paying the costs of the appeal.

CASES IN THE SUPREME COURT

EASTERN DIST.
January, 1839.

ZACHARIE ET AL. vs. NASH.

ZACHARIE ET AL.
vs.
NASH.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The defendant, representing himself as agent, writes to the plaintiffs, requesting them to purchase an assorted cargo, for the schooner Charleston, belonging to his principals, Messrs. B & B, and to value on them for the amount, which is acceded to; and the invoice made out for account and risk of B and B, per order of defendant, at Matagorda, to whom the cargo is consigned. and a bill drawn by them on B & B, at Boston, for the amount, which is accepted, *but not paid* : *Held*, that the defendant is not liable.

(A person who draws a bill of exchange, declaring himself at the same time, to be the *agent of the drawees*, is not liable individually, on protest and non-payment of the bill.)

This is an action to charge the defendant with the value of a cargo and invoice of goods, shipped and consigned to him by the plaintiffs, and to recover from him the amount of a bill of exchange, which had been drawn by them on his principals, Messrs. Barrett & Brown, of Boston, to cover the goods so purchased, and which was accepted but not paid.

The plaintiffs seek to make the defendant liable on his letter, which induced them to purchase and ship the goods in question to him at Matagorda. The facts of the case and this letter, are fully stated in the opinion of the court which follows.

The defendant pleaded a general denial.

The parish judge was of opinion the defendant was liable, and gave judgment against him for the amount claimed ; and he appealed.

J. Skidell for the plaintiff, submitted the case upon the record.

L. Peirce, contra.

Bullard, J., delivered the opinion of the court.

This case has been submitted to the court without any

argument or reference to authorities, upon a single point suggested by the appellant, to wit: that the judgment of the Parish Court is contrary to law and evidence.

The facts, as shown by the record, are these: The defendant, Nash, wrote a letter from Matagorda addressed to the plaintiffs, which was handed to them by the captain of the schooner *Charleston*, belonging to Messrs. Barrett & Brown, of Boston, in which he requests them to furnish an assorted cargo, and to value on Barrett & Brown therefor. He informs them that he has written to that house, requesting them to forward to the plaintiffs such instructions as would facilitate the vessel's immediate despatch. He further informs them that Barrett & Brown had furnished him, the defendant, a letter of credit at Mobile, with N. H. Robertson & Co., in case the vessel should be sent there, "to whom, he adds, should you think proper you can apply." After giving some instructions as to the cargo, the defendant adds, "as I am a stranger to you it may not be amiss in me to state that I am the accredited agent of Messrs. Barrett & Brown, and this may only be an introduction for other and larger cargoes, as we have three vessels in this quarter."

In pursuance of this request the plaintiffs purchased the assorted cargo, of which the invoice was made out for account and risk of Messrs. Barrett & Brown, per order of D. R. Nash, of Matagorda, and consigned to him. For the amount of the cargo and other disbursements, the plaintiffs drew their bill of exchange on Barrett & Brown, which was duly accepted, but at maturity, protested for non-payment, the drawees having in the mean time made an assignment of their property.

This evidence appeared to the Parish Court, sufficient to render the defendant, Nash, personally liable for the amount of the bill thus drawn, together with damages after protest.

In this conclusion we cannot concur. The defendant explicitly represented himself as the agent of Barrett & Brown, and the plaintiffs dealt with him in that capacity; and the transaction was ratified by his principals, by accepting the bill drawn on them as directed. Nothing shows that

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The defendant, representing himself as agent, writes to the plaintiffs, requesting them to purchase an assorted cargo for the schooner *Charleston*, belonging to his principals, Messrs. B. & B. and to value on them for the amount; which is acceded to, and the invoice made out for account and risk of B & B, per order of defendant at Matagorda; to whom the cargo is consigned, and a bill drawn by them on B & B, at Boston, for the amount, which is accepted but *not paid: Held*, that the defendant is not liable.

A person who draws a bill of exchange, declaring himself at the same time to be the agent of the drawees, is not liable individually, on protest and non-payment of the bill.

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the defendant intended to make himself personally liable, nor that he was a partner, or that he exceeded his powers. If instead of writing the letter in question, Nash had drawn the bill of exchange, declaring himself the agent of the drawees, the plaintiffs could not have recovered against him, on protest for non-payment. *Krumbhaar vs. Ludeling*, 3 *Martin*, 640, 10 *Louisiana Reports*, 390.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed, and that ours be for the defendant, as in the case of a non-suit, with costs in both courts.

ZIMMER vs. THOMPSON ET AL.

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

Where a warrantor is called in by the defendant, and the sheriff's return shows he has not been found, it is the duty of the party calling him, to use all diligence to have him cited; or a curator *ad hoc* appointed to defend him, if he resides out of the state.

This is a redhibitory action. The plaintiff alleges he became the purchaser of a slave named Betsey, at auction, for the sum of one thousand and seventy dollars, which belonged to, and was put up to be sold at public auction by the defendants, and warranted to be a good house servant, cook, washer and ironer, and fully guaranteed against all redhibitory vices. He further shows, that said slave did not possess the qualifications, as a good servant, with which she was sold; and was consumptive and in declining health at the time of the sale, to the knowledge of the defendants, and which they concealed. That he has tendered said slave

to the defendants, and demanded the price to be paid back, and the sale cancelled, but that they have refused to comply. Wherefore he prays judgment, requiring the defendants to take back the slave, return him the price, and have the sale cancelled.

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The defendants pleaded a general denial; and further averred that they purchased this slave with others, from one Taylor, residing in Tennessee, at the relative price of one thousand dollars, whom they pray leave to call in warranty, and to have judgment over against him in warranty in case of recovery by the plaintiff.

The sheriff returned, that the warrantor could not be found in his parish.

The cause was placed on the trial docket. On the day it was called the defendant's counsel objected to go to trial, because the case was not properly at issue, the warrantor not having answered; and the call in warranty was not served on any person appointed to represent him. The objection was overruled, and the defendant's counsel took his bill of exceptions.

The plaintiff made out his case and had judgment, from which the defendant's appealed.

Rousseau, for the plaintiff.

Roselius, for the defendants and appellants.

Martin, J., delivered the opinion of the court.

The plaintiff seeks the rescission of a sale of a slave, on the ground that she has been sold as a good house servant, plain cook, washer and ironer, and is unable to cook, wash, or iron; and labored besides at the time of the sale, and still labors under a redhibitory disease. The general issue was pleaded, there was judgment for the plaintiff, and the defendants appealed.

Our attention is first drawn to a bill of exceptions, taken to the opinion of the court, ordering the trial to proceed, notwithstanding defendant's allegation, that the cause had been

EASTERN DIST. irregularly set down for trial, before her vendor, whom she
January, 1839. had prayed leave to call in warranty had been cited.

JOURDAN ET AL. It does not appear to us the court erred. The sheriff
vs. returned, that the warrantor could not be found in his parish,
BARRETT ET AL. and the defendant suffered more than a month to elapse

Where a war-
 rantor is called
 in by the defen-
 dant and the she-
 riff's return
 shows he has not
 been found, it is
 the duty of the
 party calling
 him to use all
 diligence to have
 him cited, or a
 curator *ad hoc*
 appointed to de-
 fend him, if he
 resides out of
 the state.

without taking out an *alias* citation, or causing a curator to
 be appointed to the warrantor, who resides out of the state,
 to the knowledge of the defendant. A warrantor being cited
 by the defendant, for the benefit of the latter, the plaintiff is
 under no obligation to take any steps to have the citation
 served or a curator appointed; nor to wait an unreasonable
 time for this being done by the defendant.

On the merits, the plaintiff fully proved his case.

It is, therefore, ordered, adjudged and decreed, that the
 judgment of the Parish Court be affirmed, with costs.

JOURDAN ET AL. vs. BARRETT ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The act of Congress of the 20th May, 1820, grants the right of pre-emption
 to front proprietors, to purchase an equal quantity of land in their rear,
 and adjacent to their front tracts, not exceeding the same, and extending
 not more than 40 arpents in depth; provided notice is given and payment
 made, within two years; otherwise the right of pre-emption shall cease,
 and become void.

Where back concessions or rear lands are claimed by several adjacent front
 proprietors, situated in the bend of a river, the surveyor general is to
 divide and apportion them, in the most equitable manner, among such
 front proprietors as avail themselves of their privilege under this
 act, when by the converging of the side lines, there is not the full quantity
 for all the claimants.

But, where only one front proprietor claims the privilege, under the act of congress, to enter his back lands, in a bend of the river, by converging lines, he is entitled to his *full* quantity, and the surveyor general is bound to lay it off to him. This right was contingent, and the quantity liable to be reduced, so long as the act was in force, but it became absolute and vested on the expiration of the act, which could not be affected by a revival of the law, subsequently; nor by the operations of the surveyor general.

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VS.
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Such front proprietors as neglected or failed to enter their back concessions, before the expiration of the act, forfeited their right, and when the law was afterwards revived, it did not revive their rights, to the prejudice of the only purchaser, who had availed himself of the privilege.

The decision of the Secretary of the Treasury, approving the operations of the surveyor general, in making the apportionments among different claimants, is not conclusive upon the legal rights of the parties in a court of justice. The authority of the surveyor general to make this apportionment is confined to cases of conflict between *different claimants under the same act*.

This is a petitory action, by two plaintiffs, to recover from the defendant, to be taken from the sides of his tract of land, thirty-one and thirty-three superficial arpents of land, as parts of back concessions.

The plaintiff, Landry, is the front proprietor of six arpents on the river Mississippi, with the depth of forty. In virtue of the act of congress, of the 15th June, 1832, granting back concessions to front proprietors, he entered one hundred and fifty-four arpents, back of, and in the rear of his front tract, and complains that the defendant has taken illegal possession, and claims thirty-one superficial arpents of this tract.

Jourdan, the other plaintiff, is proprietor of eight arpents fronting on the Mississippi, with the ordinary depth. He entered two hundred and sixty-nine superficial arpents in his rear, under the pre-emption law of 1832, and now complains that the defendant has taken thirty-three superficial arpents of his back concession.

Both plaintiffs pray judgment for the respective pieces of land claimed by them, and damages.

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The defendant is owner of a front tract of twenty-seven arpents, by the depth of forty, derived by several mesne conveyances from Michel D. Bringier; who, on the 13th April, 1822, purchased his back concession, consisting of five hundred and ten acres, from the United States, under the provisions of the pre-emption law dated, the 11th May, 1820.

The front tracts of the parties litigant adjoin each other, and are situated on a point or concave bend of the river, and as the side lines, under the original titles of the front tracts, have a course as nearly as possible at right angles with the river, they necessarily converge, making the tracts narrower in the rear than they were on the river. Bringier had his back concession surveyed by Wilson, principal deputy surveyor for the eastern district of Louisiana, and a plat thereof returned to the land office, the 17th December, 1822. It gave the full quantity of five hundred and ten acres. There was then no other adjacent lands entered under the law of 1820.

The defendant, Barrett, pleaded a general denial, and set out his title, as purchaser from Le Roy Pope, who bought of Wade Hampton, the immediate vendee of Michel D. Bringier, to whom the land in controversy was sold by the United States, and he was put in possession by Wilson, the principal deputy surveyor of the United States for the eastern district of Louisiana.

Hampton's heirs, being called in warranty, came in and set out title on the part of the defendants at full length. The facts of the case are fully given in the opinion of the district judge.

"The acts of congress granting pre-emption rights to back lands in Louisiana, under which this controversy arose, are three in number. The first was passed the 3d March, 1811, the second on the 11th May, 1820, and the third on the 15th June, 1832. The acts of 1811 and 1832, limited the time of making entries of these lands to three years each; and that of 1820, to two years from its passage.

The act of 1820 revived the fifth section of the act of 1811. But the act of 1832 does not refer to any previous law,

although copied verbatim from the fifth section of the act of 1811. The right of pre-emption conferred by each of these acts became void, if not exercised within the delay fixed by the terms of the act. Consequently, a purchase made after the 15th June, 1835, was too late to give the purchaser a title. But the receipt of the plaintiff, Landry, signed by the receiver of public moneys, for the eastern land district of Louisiana, is dated the 8th March, 1836. At that date his right of pre-emption had ceased to exist. In a petitory action no principle is better settled, than that the plaintiff must succeed by the strength of his own title, and not by the weakness of his adversary's.

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As regards the plaintiff, Jourdan, his purchase was evidently made within time, and under the operation of the law of 1832. The thirty-three arpents claimed by him are adjacent to, and back of a tract confirmed to him by the United States.

Were these thirty-three arpents vacant lands at the time of Jourdan's purchase?

The government, no more than any other vendor, could give a better title than it possessed. If the land was already sold, the sale to Jourdan was an illegal one, tortious on the part of the government officers, and null as regarded third persons.

The warrantor of defendant, Bringier, purchased as already stated, on the 12th April, 1822, and within the period limited by the pre-emption law of 1820.

But it is contended, that there were two fatal irregularities in this purchase. 1st., the quantity of land purchased by Bringier, was greater than he was entitled to, under a proper construction of the pre-emption law in question.

2nd. That the purchase should have been preceded by a survey defining the boundaries.

1st. The counsel of plaintiffs have, throughout their argument upon this ground of objection, taken the ideas of a right and of a claim as synonymous. And the surveyor general of the United States for Louisiana, Mr. Williams, has evidently assumed the same premises, for in his township map

EASTERN DIST. of the litigated and circumjacent lands, made in 1834, this
January, 1839. officer has apportioned out to the several front proprietors,
JOURDAN ET AL. including plaintiffs and defendants, the whole of the lands,
vs. lying back of, and adjacent to their front tracts, on a prolon-
BARRETT ET AL. gation of the extreme side lines of the converging tracts, to
the depth of eighty acres from the river, or forty from the
back limit of the front tracts. Such an apportionment, made
in 1834, under the pre-emption law of 1832, evidently took
for granted, that the rights of front proprietors who made no
claims until the year 1832, were not prejudiced or divested
by their neglect to enter their lands, under the pre-emption
law of 1811 and 1820, the lands back of and adjacent
to their front tracts.

In virtue of what law did the surveyor general, Williams, make this apportionment, in the year 1834? Avowedly in virtue of the act of 1832. See his evidence.

This act could not have been intended to control any but claims or purchases made under it. If in express terms, it had purported to regulate purchases made many years before, it would have been an *ex-post facto* law, and so far unconstitutional and void.

But Bringier, or his vendees, made most assuredly no claim for back lands, under the act of 1832. And yet, while his purchase of 510 acres is curtailed very considerably in favor of his neighbors, there are still some hundreds of acres allotted to him on this township map.

Here is a recognition by the surveyor general, of Bringier's having acquired the title of the United States to some lands back of, and adjacent to his front tract.

I look in vain for the source from which emanates this pretended authority, on the part of a surveyor of the public lands, or even of the secretary of the treasury, to deprive a man of his property.

A title once vested is clearly beyond his control: he can no more modify it, than he can take it away altogether. In the year 1822, Bringier made his purchase. By the terms of the act of congress, under which he bought, his purchase dated from the notice of his claim given to the register of the

land office. This was done on the 12th April. All the neighboring front proprietors might have exercised the same rights of pre-emption up to the 11th May, of the same year. But what was the consequence if they did not? In the words of the statute, their rights of pre-emption ceased, and became void. The right of pre-emption was revived many years afterwards. But this revival did not and could not interfere with, modify or destroy rights vested in third persons, who had availed themselves of the previous pre-emption law while it existed, and had by greater diligence than their neighbors, secured the ownership of the back lands. This is conformable to the plainest principles of natural law; and the contrary doctrine could only have arisen from the confusion of ideas above mentioned, the confounding of a right with a claim.

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The right under the act of 1832, was a right to enter vacant lands, and none other lands; that is to say, vacant at the date of that act. Governments, like individuals, can only rightfully dispose of what belongs to them; and the argument cannot for a moment be tolerated, that they are free to make a sale or partition of what they have already alienated.

2nd. This brings me to the consideration of the other argument against the defendants' title. It is contended, that the formalities required by law, not having been fulfilled, the sale to Bringier was a nullity.

No survey appears to have preceded the sale to Mr. Bringier.

Various laws have been quoted to prove that the sales of the public domain must invariably be preceded by a survey. See pages 349, 420, 456, 460, 482, 487, 570, 587, and 590, of the land laws.

There is no doubt, from an inspection of these laws, that all *public* sales of the lands of the United States must be preceded by surveys. These surveys are uniform in their character in each land district, starting from a basis meridian line, and continued east and west from such meridian, by ranges of townships, each of which townships is six English

EASTERN DIST. miles square, and is divided into thirty sections or square
January, 1839. miles, these last being again divisible into quarter sections.
JOURDAN ET AL. These general surveys must, according to one of the statutes,
VS. be carried on with sufficient despatch, to allow of twenty
HARRITT ET AL. townships being offered for sale, twice a year in each land

district. When the surveys have been returned in the general land office, the president of the United States issues his proclamation, ordering the sales to be made by public auction, and designating the time and place of such sale.

Now, the sale to the defendants' warrantor, Bringier, was a private sale, made in virtue of particular statutes, which must be viewed as deviations from the general system of land sales.

An act of congress, passed the 24th February, 1810, and found at page 570, of the land laws, declares, it is true, that every applicant for purchase at *private* sale at any of the land offices of the United States, shall produce to the register, a memorandum in writing, describing the tract in which he shall enter, by the proper number of the section, township and range, subscribing his name thereto. This act has been pressed on my consideration as decisive of the question. The memorandum given by Bringier to the register, did not describe the tract claimed by the proper number of the section, township and range, for one reason among others, that this was impossible, the township surveys not having been extended to that part of the country at the time. See the testimony of Samuel H. Harper, then register of the land office in this district, on this head.

But we must look to the act of 1811, and not to that of 24th February, 1810, for information respecting the formalities which it was necessary for Bringier to observe in his purchase or entry. If we find it differ from that of 1810, the latter as being the earlier statute, is *pro tanto* repealed.

The dispositions of the act of 1811 on this subject, are as follows: "Every person entitled to the benefit of this section (sect. 5,) shall, within three years after the date of this act, deliver to the register of the proper land office, a notice in writing, stating *the situation and extent* of the land he wishes

to purchase, and shall also make the payment, etc.” Nothing is here said about a description by the proper number of the section, township, and range. In the notice given by Brongier, the situation and extent of the tract of land he wished to purchase are given; and where I find the requisitions of the statute substantially complied with, there is the less reason for holding the claimant to an impossibility.

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It may, indeed, well be questioned, whether the act of 1810, could in any case be considered as applicable to purchasers under the 5th section of the laws of 1811, revived by the law of 1820. That pre-emption law recognized a mode of surveying, totally different and irreconcilable to the township surveys. The French and Spanish surveys in Louisiana had no reference to a basis meridian line, by which the position of every acre comprised in them, could be determined with mathematical exactness. They referred to natural boundaries, a water course for instance, and not to imaginary lines.

The land measures are different; the French arpent in the one case; the English acre in the other. Each grant ran its side lines for an arbitrary extent in depth, and at various angles from the front line. To prevent, indeed, the hopeless confusion that would attend the attempt to blend two kinds of surveys, so different in all their elements, the same statute of 1811 in its second section, (page 587 of the land laws) provides, that the principal deputy surveyors of the territory of Orleans be authorized, in surveying public lands in said territory, adjacent to a river, lake, creek, bayou, or water course, to vary the mode of surveying heretofore prescribed by law, so far as relates to the contents of the tracts, and to the angles, and boundary lines: provided, that such deviations from the ordinary mode of surveying, be made with the approbation of, and in conformity to the general instructions, which may be given to that effect, by the surveyor of the public lands south of Tennessee. That the claims of back lands, under the pre-emption right, given by the fifth section of this law, were to be surveyed in a different plan to the usual mode of surveying the United States lands, is obvi-

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ous, from the expressions of the fifth section. "The principal deputy surveyor of each district shall be, and is hereby authorized, under the superintendence of the surveyor of the public lands south of the state of Tennessee, to cause to be surveyed, the tracts claimed by virtue of this section." What is it that the principal deputy is authorized to survey? A township or a section of public lands? No: but a vacant tract, back of, and adjacent to a confirmed French or Spanish grant, not to exceed in dimensions the front tract, nor to extend back more than forty arpents. Note the word "*arpents*." It is certain that this measure is not used by American surveyors, for the admeasurement of townships and sections.

But it is contended, that even if it were not necessary for Bringier to describe his claim by township, or get the situation and extent of it, required to be specified in the notice to the register, it could only be ascertained by definite metes and bounds, the result of the operations of a surveyor. I have to come to a different conclusion. The purchase of each claimant dates according to law, from the delivery of the notice. Each proprietor interested had a right to deliver this notice on the first day the law went into operation. The right of such proprietor was not one whit impaired, if he delivered this notice only on the last day the law was in force. But suppose what is extremely probable, that in the course of the two or three years that elapsed, between the first and the last of these dates, every one of a dozen or twenty confirmees on a concave bend of the river, and whose side lines all converged towards a common centre, should have notified the register of a claim for vacant land, back of and adjacent to his front tract, and of equal extent to his front tract. It is obvious, that each could not obtain his full quantity. What was then to be done to settle so many conflicting claims of precisely equal rank? The act defines them to be pursued with the utmost clearness. "In all cases where by reason of bends in the river, lake, creek, bayou, or water course, bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal

to the adjacent tract already owned by him, to divide the vacant land applicable to that object, between the several claimants in such manner as to him may appear most eligible." Who is to divide? The passage just quoted, is the second member of a sentence; and by reference to the first member, we find it to be the principal deputy surveyor of each district respectively, who is therein authorized, under the superintendence of the surveyor of the public lands south of the state of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section; and, in all cases, are. The surveying and the dividing, being in such close juxtaposition, might evidently be in the case above supposed, included in one operation. There is nothing at least in the law which prohibits such postponement of the survey. The principal deputy surveyor is authorized (not commanded) to survey. Nor must such plat of survey, by the terms of the act, be filed with the register, on the delivery of the notice followed by the payment, which instantly divests the title of the United States.

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The facts connected with Bringier's survey are as follows:

The pre-emption act of 1820 expired, and the principal deputy surveyor of the eastern land district of Louisiana, Mr. Wilson, surveyed Bringier's purchase of 510 acres of vacant land, back of, and adjacent to his front tract, without its being necessary to exercise the discretionary powers vested in him by this act, inasmuch as the contingency did not happen for the exercise of those powers. There were no adjacent claims of a similar nature; and consequently, Bringier could, and did obtain his full quantity.

Wilson's plat of survey is dated the 17th December, 1822. It was not included in a township map, because there was no township survey of that neighborhood, until several years afterwards. In the years 1829 and 1830, the township within the limits of which this tract is situated was surveyed, and the township map was submitted to the surveyor of public lands south of the state of Tennessee. This map included the detached survey made in 1822, by Wilson, for Bringier, which survey was modified by the surveyor of public lands

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south of Tennessee, and Righter, the principal deputy surveyor for the eastern land district of Louisiana; and the map, so modified, was approved by the former officer, on the 9th March, 1832. What right these officers had to change the survey of Wilson, I will not here stop to inquire. The defendant has adopted the modification, and now claims under Righter's survey, which contains the same area as Wilson's, and was made in the spring of 1830. The plaintiffs contend, that when Mr. Fitz, the surveyor south of Tennessee, approved the map of Righter, he was without jurisdiction in Louisiana, the approval being dated in 1832, and the office of surveyor general for Louisiana having superseded that of principal deputy for the district east of the island of Orleans, on the 1st May, 1831.

By the testimony of Righter, it appears that his map was made and submitted to the surveyor south of Tennessee, and the modification of Bringier's survey, made at the suggestion of the latter, in the year 1830, while the office of principal deputy surveyor still existed, and the surveyor south of Tennessee still had a superintending power over surveys in that part of Louisiana.

It is not seen how an act of congress of 1831, can affect acts legally done before its passage. The report by the principal deputy surveyor had been made to his legal superior at the time. The field notes, and other necessary documents, had been transmitted to that legal superior; and I cannot admit that the power of the latter (whose office was not abolished by the act of 1831) of ratifying the acts thus legally under his cognizance, should be taken away by implication.

The surveyor general of the United States for Louisiana, has taken upon himself to treat the acts of his predecessors as nullities; and by a township map, approved in 1834, has made entire distribution of the back lands of the defendant, and his neighbors. This survey, though it appears to have met with the approbation of the commissioner of the land office, and the secretary of the treasury, I must reject as governing the rights of the parties herein, for the reasons already given by me.

The mature deliberation which I have given the subject, has brought my mind to the conclusion, that claims made under the pre-emption law of 1832, could not have a retrospective operation, so as to defeat or modify rights vested under the pre-emption law of 1820, long previously expired. That the principal deputy surveyor, Wilson, did not violate the law, in the survey made by him, of the back tracts of the White Hall plantation ; but, on the contrary, that the apportionment made by the surveyor general, Williams, of the lands in question, as vacant lands, was unauthorized by law, and a violation of the rights of the defendant.

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It is, therefore, ordered, adjudged and decreed, that there be judgment in each of the present suits, for the defendant, Thomas Barrett, with costs.

From this judgment the plaintiffs appealed.

Winchester, Taylor, and Ives, for the plaintiffs.

1st. The appellants owned front tracts, and by reason of a bend in the river bordering on them, and of adjacent claims of a similar nature, could not obtain a tract equal in quantity to the tract already owned by them. The surveyor general caused them and the adjacent claims of a similar nature to be surveyed, and divided the land applicable to the object between them ; and the appellants paid the price, obtained the receipts of the receiver of public moneys of the United States, and entered their back lands accordingly. They acquired all the title of the United States to these tracts. 4 *Martin, N. S.*, 260, 4 *Louisiana Reports*, 547.

2nd. The lands of the United States cannot be sold until they have been surveyed, in the manner provided by law, and the boundaries and contents of every distinct portion are determined. The officers of the government cannot sell to any individual at private sale, until he produces to the register a memorandum in writing, describing the tract which he shall enter by the proper number of the section, half section, or quarter, (as the case may be) and of township and range ;

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and no sale is complete, nor does any title vest in the purchaser, until an entry of the tract is made in the office of the register of the land office, in the district where the land is situated. See *Land Laws*, 349, 456, 460, 484, 489, 587, 590, and 770.

3rd. The pretended purchase of Bringier from the United States, in 1822, in virtue of the provisions of the act of congress of 11th of May, 1820, under which the defendants claim, is invalid, and vested no title in him, since his application contained no legal statement or description, of the situation and extent of land he wished to purchase. There was no plat of the surveys of the tracts which front proprietors were entitled to purchase in virtue of that act, in that portion of the country in which the lands in question are situated; and no entry of the tract claimed by defendants, or of any other back of the front tract owned by Bringier, was ever made by him.

4th. If the fact of payment, by Bringier, gave him title to any land back of, and adjacent to his front tract, it was only to such a portion as he was entitled to purchase, under a just and equitable construction of the act of congress. His front tract was at a point where the river made a bend, and the act made the quantity and location to which he was entitled, depend on the condition of survey and division by the surveying department. Until that condition was fulfilled, his right to any specific portion did not exist; the division is now made, and the tract Bringier was entitled to purchase, is represented in the surveys of the United States, on the township maps, and contains 218.94 superficial acres; for in that case, as the act of congress made a part of his title, his right under it is to be determined by the words of the act, the intention of the government, and the manner in which the act has been executed. *Civil Code*, 1940, No. 4 and 1941 to 1954. 2 *Kent's Commentaries*, 620. 1 *Peters' Reports*, 667.

5th. The survey of Wilson was not approved by any officer, and is an individual survey without authority. The survey embraced in a township plat, which appears to have been approved by the surveyor general south of Tennessee,

can have no application to the defendant's case, and is without force in the present controversy, inasmuch as no division of the back lands was made in conformity with the provisions of the act, and the approval was not made by the proper officer; and if they had been approved by the proper officers, they could produce no effect upon the decision of the cause, for the act itself determines the rights of the claimants, and directs a survey and division of the land applicable to the object to be made, in conformity to their rights. The surveys are not in conformity to the right of Bringier under the act; were made in error; and can have no effect upon the title. 6 *Martin, N. S.*, 216. 1 *Martin, N. S.*, 457. 3 *Martin, N. S.*, 15.

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6th. The decision of the officer to whom the United States entrusted the power of dividing the lands in the present controversy, between the claimants under the various acts, in virtue of which front proprietors were entitled to a preference, in becoming purchasers of the vacant tracts of land adjacent to, and back of their front tracts, and which has been approved by the public functionaries to whom he is responsible, cannot be inquired into in courts of justice, and is final between the parties. *Civil Code of 1808, page 266, article 34.* 8 *Martin, N. S.*, 645. 3 *Louisiana Reports*, 556. 3 *Peters*, 96.

Preston, Peirce, and Brycé, for the defendants.

Preston argued at length on behalf of Hampton's heirs, who were called in warranty, and for the defendants generally. He maintained that Bringier, having entered his back concession, under the act of congress, passed the 15th May, 1820, and paid the United States government before it expired, acquired a complete and indefeasible title to his full quantity, *which vested and became absolute* on the expiration of the act; the plaintiffs having neglected and failed to make their entries and purchases during the same time.

Bullard, J., delivered the opinion of the court.

The plaintiffs assert title to different portions of land

EASTERN DIST. possessed by the defendant, which they purchased of the
January, 1839. United States, in virtue of the acts of congress granting to
JOURDAN ET AL. front proprietors the right of purchasing public lands back of,
vs. and adjacent to their front tracts. The evidence of title
BARRETT ET AL. which they exhibit, to wit, certificates of purchase, and an
 apportionment of the lands among conflicting claimants,
 under the same acts of congress, under the superintendence
 of the surveying department, appears to us sufficient to
 authorize a judgment in their favor, unless the title of the
 defendant be older or better, or the plea of prescription which
 he sets up should be sustained. Our attention, therefore,
 must be directed principally to the title of the defendant.

The latter claims under Bringier, by several mesne conveyances, and the record shows that Bringier was the proprietor of a tract of land on the river Mississippi, having a front of about twenty-seven arpents, with the ordinary depth of forty, and was clearly of that class of persons who had a right under the pre-emption laws, to purchase, to a greater or less extent, the adjacent public land in the rear of their plantations. Under the act of 1820, to which we shall hereafter allude more particularly, Bringier did purchase a quantity of land in his rear, not exceeding the superficies of his front tract. This purchase embraces the *locus in quo*. Neither party has a patent, and in this respect both parties stand upon the same footing. The question, therefore, presented for our consideration is, whether Bringier purchased more land than he was entitled to under the act of 1820, in relation to the plaintiffs, who were also front proprietors, and, in consequence of a bend in the river, were entitled to purchase a part of the same land entered by Bringier. This renders it necessary to examine critically the acts of congress under which the parties claim.

The right of preference in question was first extended to the proprietors of front tracts by the 5th section of an act of congress passed in 1811, entitled "an act providing for the final adjustment of claims to lands, and for the sale of the public lands in the territories of Orleans and Louisaina, etc." This part of the statute expired by its own limitation in three

years, and was revived for two years by the act of May 11th, 1820, entitled "an act supplementary to the several acts for the adjustment of land claims in the state of Louisiana." It was twice afterwards revived for limited periods, in 1832 and 1835. Bringier purchased under the act of 1820, and the plaintiffs under those of 1832 and 1835, after a lapse of many years, during which no such law existed.

That act of congress accords to every owner of a front tract of land, "a preference in becoming purchaser of any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpents in depth, nor in quantity of land that which is contained in his own tract." It is made the duty of the principal deputy surveyor of each district, "under the superintendence of the surveyor of public lands south of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section;" and it provides, that he shall "in all cases where by reason of bends in the rivers, etc., etc., bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal in quantity to the adjacent part already owned by him, to divide the vacant land applicable to that object between the several claimants, in such way as may appear to him most equitable." The same section, after providing for the manner of giving notice, and fixing the mode and time of payment, concludes by declaring, that "if any such person shall fail to deliver such notice within the said period of three years, or to make such payment or payments at the time above mentioned, the right of pre-emption shall cease, and become void, and the land may thereafter be purchased by any other person, in the same manner, and on the same terms, as are or may be provided by law for the sale of other public lands, etc."

The front tracts of all the parties to this suit are situated upon a point formed by a bend of the river, and the side lines converge in such a manner as that there is not sufficient land in the rear to give to each the quantity equal to that contained in his original tract. It is, therefore, clear that if all had purchased under the act of 1820, it would have become the duty of the surveying department to apportion the land

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The act of congress of the 20th May, 1820, grants the right of pre-emption to front proprietors, to purchase an equal quantity of land in their rear, and adjacent to their front tract, not exceeding the same, and extending not more than forty arpents in depth; provided, notice is given and payment made within three years; otherwise, the right of pre-emption shall cease and become void.

Where back concessions or rear lands are claimed by several adjacent front proprietors, situated in the bend of a river, the surveyor general is to divide and apportion them in the most equitable manner among such front proprietors as avail themselves of their privilege under this act, when by the converging of the side lines, there is not the full quantity for all the claimants.

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among them. But in point of fact, Bringier alone delivered his notice and made his purchase, during the existence of that act of congress, of a tract not exceeding the quantity contained in his front tract; and the question is whether the purchase of Bringier is to be curtailed, so as to allow to the plaintiffs their equitable proportion, they having given their notice and made payment, under a subsequent law, after an interval of more than ten years.

We may premise, that, in our opinion, the absence of patents can have no influence upon the rights of the parties in this case, but that those rights are to be determined by the rules which regulate the contract of sale. The sovereign having made an offer or proposition to sell, subject to certain conditions and restrictions, and that proposition having been accepted, and the terms as to payment of the price complied with, we have only to inquire whether the title thus acquired by Bringier became indefeasible and absolute, as soon as the law expired, when no other proprietor, whose pretensions might interfere with him, had thought proper to avail himself of the privilege proffered by the act of congress; and whether his title could be affected by the revival of the same law ten years afterwards. If Bringier's front tract had been situated on a straight part of the river, and the side lines parallel to each other, and he had been the only purchaser or claimant, there can be no question but that he would have acquired a good title, and it would have been the duty of the surveying department to lay it out according to the directions

But where only one front proprietor claims the privilege under the act of congress to enter his back land, in a bend of the river, by converging lines, he is entitled to his full quantity, and the surveyor general is bound to lay it off to him. This right was contingent, and the

of the statute. Whatever may be the situation of the front tract, the owner has a right to purchase a quantity equal in superficies to his front tract, subject to the operations of the surveyor, if his neighbors, situated on the same point, avail themselves of the same privilege. When congress speaks of the front tract, they speak of the owner; but the surveyor is to act only on the *land claimed* under the law, and those who deliver a notice of their intention to accept the offer, are spoken of as *claimants*. If there be but one claimant, it is equally the duty of the surveyor to lay off the land purchased by him. We, therefore, consider the right of Bringier, as a

claimant under the act of congress, although contingent or defeasible during the existence of the law, while his neighbors had also a right to *claim* the privilege of the act, by complying with its conditions, as having become complete and vested by the expiration of the law. By suffering the law to expire without delivering their notice, the right on the part of the plaintiffs to purchase was forfeited, by the express terms of the act, and it is difficult to conceive how it could be afterwards revived to the prejudice of the defendant by any legislative authority, much less by the operations of the surveying department. But it is contended, that the last clause of the section reserved the land not claimed under the law, to be sold like other public lands, which was not and could not have been done in this case. To this it may be answered, that by that part of the section, not only did those who had not purchased within the time limited, forfeit their *right to buy*, but those who *had* purchased according to the terms of credit then allowed, and had failed to pay, forfeited the land itself. The last words, therefore, amount, according to our understanding of them, to a declaration that the lands thus purchased and not paid for, shall not only revert to the domain, but that they shall so revert *ipso facto*, by the non-payment of the price, so completely as to be liable to sale or private entry. If it had been the intention of congress merely to declare that the privilege should cease with the law, and be forfeited, such expressions would have been unnecessary, if not absurd, because the land itself in the case supposed would never have ceased to belong to the domain, and a declaration that "the lands might thereafter be purchased by any other person in the same manner, and on the same terms as are or may be provided by law for the sale of other public lands," would have been, to say the least of it, a very idle declaration, inasmuch as the lands were already liable to be sold according to law.

But it is further urged, on the part of the appellants, that the public lands cannot be sold without a previous survey, and that the officers of the government are not authorized to sell to any individual at private sale, until he produces to the

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quantity liable to be reduced, so long as the act was in force, but it became absolute and vested on the expiration of the act, which could not be affected by a revival of the law subsequently, nor by the operations of the surveyor general.

Such front proprietors as neglected or failed to enter their back concessions before the expiration of the act, forfeited their right, and when the law was afterwards revived, it did not revive their rights to the prejudice of the only purchaser, who had availed himself of the privilege.

EASTERN DIST. register a memorandum describing the tract he wishes to
January, 1839. purchase, by its legal subdivisions, and that no title can vest

JOURDAN ET AL. until this mode has been pursued. They cite the act of
vs. 1810, in support of this position.
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Such is undoubtedly the general law which regulates the sale of the public lands. But the statute in question creates clearly an exception to that rule, by authorizing the sale of the back lands in tracts of different quantities, and irregular shapes, and which require to be surveyed and laid off after the sale. The act declares that the date of the purchase shall be the date of the notice, thereby clearly indicating that the title of the purchaser shall vest independently of any survey; and at the time of filing the notice, subject as we have already observed, to a reduction in quantity, in cases of other claimants, and an insufficiency of land for all.

It is again urged, that Bringier's application contained no legal statement or description of the situation and extent of land which he wished to purchase; that there was no plat of survey of the tracts which the front proprietors were entitled to purchase. In support of this position, we are referred to a decision of the Supreme Court of the United States, relative to the location or laying of land warrants in Kentucky, in which it was held that the calls must be so specific and precise, as to enable others to locate the adjacent vacant lands. In deciding in the case now before us, upon the sufficiency of Bringier's notice or application, we cannot look beyond the statute under which it was made, and by which it must be governed. No particular form is prescribed, much less does it require the exhibition of a survey. Any description which would show that the applicant or claimant is a front proprietor, and entitled to the benefit of the act, would in our opinion suffice.

It is lastly contended, that the decision of the surveyor general, whose duty it is to apportion the public lands among the different claimants under the pre-emption laws, approved by the public functionaries to whom he is responsible, cannot be inquired into in courts of justice, and is final between the parties; and it is shown that the operations of the surveyor

general, by which the purchase of Bringier has been restricted and curtailed, in order to give a portion of the land to the plaintiffs, has been approved by the secretary of the treasury, and the previous survey and location of his purchase by Righter, a principal deputy surveyor, has been disregarded. Such pretensions do not appear to have been entertained by the treasury department; for in the report of the commissioner of the general land office, which is approved by the secretary, it is expressly conceded, that a decision of the treasury department, adverse to Bringier, would not preclude him from seeking a remedy in the courts. Indeed it appears to us manifest, that the authority of the surveyor general to apportion the lands under the statute, is confined to the cases of a conflict between different claimants under the same law, and that he, as well as the treasury department itself, is incompetent to decide upon the validity of a title acquired by purchase, or upon the only question which this case presents, to wit: whether the plaintiffs, by neglecting to avail themselves of the privilege offered by the act of congress, did not forfeit all pretensions to the land, lying back of, and adjacent to the plantation of Bringier, to an extent not exceeding that of his front tract, and extending back forty arpents from his back line. Congress itself is incompetent, under the constitution, to destroy the vested right and title of a purchaser of the public land; and how can the surveyor general, under an authority to apportion the land applicable to that object, among several claimants under the same law, while the extent of their purchase is yet doubtful and contingent, assume to take any part of the land, purchased by Bringier, under the act of 1820, and give it to the plaintiffs, who purchased under the acts of 1832 and 1835? In the case of *Boatner vs. Ventris*, upon which the appellants rely, it is true, this court held, that the decision of the register and receiver relative to the confictions of certain donation claims in Florida was conclusive, because the act of congress constituted them a tribunal for such purposes, with the power to decide between the parties according to the circumstances of the case, and the principles of justice. But in relation to that

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The decision of the secretary of the treasury approving the operations of the surveyor general in making the apportionment among different claimants is not conclusive upon the legal rights of the parties in a court of justice. The authority of the surveyor general to make this apportionment is confined to cases of conflict between different claimants under the same act.

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class of claims, the title did not vest until the patent issued, and the donees under the government, were bound to take with all the conditions and limitations, which the donor thought proper to impose. But in cases of sale, it is totally different. If Bringier was a fair purchaser, under the act of congress, his right does not depend upon the operations of a surveyor, or the opinion of the treasury department, and cannot be modified or affected by any act of the vendor, although that vendor may be the sovereign.

These views of the rights of the parties render it unnecessary to consider the question, whether Righter's survey was properly sanctioned by the surveyor of the public lands south of Tennessee, and whether the plea of prescription ought to prevail.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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138	44
108	212
108	217

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE PARISH OF EAST FELICIANA, THE JUDGE OF THE EIGHTH PRESIDING.

An affidavit in which the affiant says, "that all the material allegations in the petition, are true to the best of his knowledge and belief," is insufficient to support an injunction.

To sustain an injunction, the affidavit must be such as to submit the party to the penalties of perjury, if the facts sworn to appear to be untrue.

When the affidavit is insufficient, the injunction must be dissolved, even if it appears from the evidence that the party would be instantly entitled to a new one.

This suit commenced by injunction, to stop an order of seizure and sale.

The plaintiff alleges, he purchased from the defendant a lot of ground in the town of Jackson, (East Feliciana) for about twelve hundred dollars; that he paid one thousand dollars in cash, and gave his three promissory notes, payable in three equal annual instalments, from the 17th May, 1834, for the balance of the price, secured by the vendor's mortgage; and that two of said notes have become due, upon which the defendant has taken out order an of seizure and sale against the property.

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He further shows, that he is the owner and holder of five notes of the defendant for one hundred dollars each, which the latter refuses to admit in payment of those sued on, although they are greater in amount. The notes are annexed to the petition, and the plaintiff prays for an injunction to restrain the order of seizure and sale; that the defendant be required to take his own notes in payment.

The plaintiff swears, "that all the material allegations in the foregoing petition, are true to the best of his knowledge and belief; and that an injunction ought to be granted."

The defendant excepted to the petition, and prayed that it be dismissed, because it does not set out a liquidated debt in compensation of the debt embraced in the order of seizure and sale.

The petition and affidavit are insufficient in law to sustain the injunction.

Upon these pleadings and issues the district judge dissolved the injunction, on the ground that the affidavit was insufficient, with twenty per cent. damages, and ten per cent. interest and costs.

The plaintiff appealed.

Lawson, for the plaintiff and appellant, insisted that the injunction was improperly dissolved, because the matters set out in the petition showed that the plaintiff is entitled to it. The judgment below should be reversed, and the injunction reinstated.

2. And where it appears, that an injunction was improvidently or irregularly obtained, yet it will not be dissolved, if

EASTERN DIST. from the evidence it is clear, the party would be instantly
 January, 1839. entitled to a new one. 3 *Martin, N. S.*, 480, 4 *ibid.*, 499, 7
ibid., 276, 8 *ibid.*, 683.

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T. L. Andrews, contra, contended, that the affidavit was wholly insufficient to sustain the injunction, and that it must be dissolved. He cited 5 *Louisiana Reports*, 50, 79 and 444.

Carleton, J., delivered the opinion of the court.

A rehearing has been granted in this cause, and the only question now raised by the parties, turns entirely upon the sufficiency of the affidavit upon which the injunction was granted at the suit of the plaintiff. It is as follows, viz. :

"George Catlett, being duly sworn according to law, says, that all the material allegations in the foregoing petition are true to the best of his knowledge and belief, and that an injunction ought to be granted."

The court below being of opinion, that the affidavit was insufficient, dissolved the injunction, dismissed the petition, and adjudged the plaintiff to pay twenty per cent. damages, and ten per cent. interest on the amount of the judgment enjoined with costs of suit. The plaintiff appealed.

An affidavit in which the affiant says, that all the material allegations in the petition are true to "the best of his knowledge and belief," is insufficient to support an injunction.

To sustain an injunction, the affidavit must be such as to submit the party to the penalties of perjury if the facts sworn to appear to be untrue.

This case does not materially differ from that of "*Reboul's Heirs vs. Behrens et al.*," 5 *Louisiana Reports*, 79. There the affiant swore, that "the material facts and allegations in the said petition, are true and correct to the best of his knowledge."

The court thought the affidavit insufficient to sustain the injunction, and held, that it ought to be "such as to submit the party to the penalties of perjury, if the facts sworn to, appear to be otherwise. He should swear to avoid these penalties, that the facts stated, as within his knowledge, are true, and those not stated as within his knowledge, he believes to be true."

The affidavit in the case before us, is equally vague and uncertain, and liable to the same objections. It appears to us insufficient, and that the court did not err in dissolving the injunction.

But the plaintiff's counsel insists that though the injunction be improvidently or irregularly taken, it will not be dissolved if it appear from the evidence that the party will be instantly entitled to a new one, and cites 7 *Martin, N. S.*, 276, 3 *ibid.*, 480, 4 *ibid.*, 499, 8 *ibid.*, 684.

But as the court held in the case above cited, we are unable to say how another injunction could have issued regularly, after the dissolution of the first, on account of the insufficiency of the affidavit, until a new and sufficient one was made, which does not appear to have been the case.

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When the affidavit is insufficient, the injunction must be dissolved, even if it appears from the evidence that the party would be instantly entitled to a new one.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

MATHEWS vs. PASCAL'S EXECUTOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The plaintiff is bound to set out every fact material to his case, whether it involves a positive or negative; but he is not required to allege the absence or non-existence of facts which might defeat his action.

In a redhibitory action, under the statute of 1834, which presumes a certain class of slaves *runaways at the time of sale*, if they elope within sixty days afterwards, it is sufficient to *allege* that the slave in question *ran away* within a *few days* after the sale, when the evidence shows it was *less* than sixty.

So, if the infliction of unusual punishment is proved, or it is shown the slave has been in the state more than eight months, it destroys the presumption of law, that a redhibitory vice existed at the time of sale; but the plaintiff is not required to *allege* that neither of these facts existed.

Exceptions which come in by way of *proviso*, or in a subsequent statute, are properly matters of defence. ["So, the *proviso* in the registry act, being

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by way of exception from the enacting clause, need not be taken notice of in a libel to enforce the forfeiture. It is matter of defence to be set up by the party in his claim." 9 *Wheaton*, 421.]

But it has been held that a plaintiff who claimed the forfeiture of a slave, on its removal from Virginia by a tenant in dower, *without the consent* of the reversioner, or heir, was bound to allege and prove the *absence* of that consent.

It is a general rule that the negative is not to be proved, but this does not apply to a case in which a party charges the other with a culpable omission, or breach of duty; for it is one of the first principles of justice not to presume that a person acted illegally.

Where the plaintiff sues under the act of 1834, which creates the presumption that the slave who runs away within two months after sale, was a *runaway* before the sale, and gives rise to the redhibitory action against the seller, *provided* said slave has not been in the state *more than eight months*; Held, that the plaintiff need not allege and prove this fact. It is for the defendant to show that he comes within the *proviso*, as a matter of defence.

This is a redhibitory action, under the act of 1834, which creates the presumption of the redhibitory vice of a *runaway* existing, in relation to slaves, at the time of sale, when they abscond within two months.

The plaintiff alleges, he bought several slaves from the testator of the defendant, (Paul Pascal,) who were fully guaranteed against all the vices and defects prescribed by law, for eight hundred dollars each. That one of these slaves, (Dempsey,) was in the habit of running away at the time of sale, and was afflicted with redhibitory diseases of body, from certain injuries received, which rendered him entirely useless, and of no value; and that *in a few days* after said sale, the slave ran away, and has not since been heard of, although every diligence was used to find him; and, finally, that all these facts were immediately communicated to the said Pascal, who was notified that a rescission of the sale, and return of the price would be claimed from him; but that he has refused to comply therewith.

Pascal having died in the mean time, judgment is demanded

against his executor, rescinding the sale and restoring the price of said slave to the petitioner, with damages and costs. EASTERN DIST.
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The defendant pleaded a general denial; and upon these pleadings, and the issue arising thereon, the cause was tried.

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The plaintiff relied on the 3d section of the statute passed the 2nd January, 1834, relative to the introduction of slaves into this state, which says: "That the buyer of a slave who institutes a redhibitory action, on the ground that such slave is *a runaway or thief*, shall not be bound to *prove* that such vice exists before the date of the sale, whenever said vice shall have been discovered within two months after the sale; and no renunciation of this provision shall be valid: *Provided*, however, that where unusual punishments have been inflicted, the legal presumption in favor of the buyer shall cease: *And provided, also*, that if any redhibitory, bodily or mental maladies discover themselves within fifteen days after the sale, it shall be presumed to have existed on the day thereof, any law to the contrary notwithstanding: *And provided, also*, that the provisions of this section shall not apply to slaves who have been *more than eight months in this state*."

The testimony adduced by the plaintiff showed that the slave in question remained *a few days* after the sale, on his plantation, in bad health, occasioned by injuries he had received, and ran away and has not been since found. The evidence showed that the slave ran away in about twelve or fifteen days after the sale, and that this fact, and the circumstances attending it, with the fruitless efforts used to recover him, were immediately communicated to the defendant.

The judge of probates, however, after reviewing the testimony, and the circumstances attending the case, came to the conclusion, "that the running away since the sale was unaccompanied by any circumstances to induce the belief that the slave was in this habit, when owned by the seller. *Louisiana Code*, 2505. Judgment of non-suit was rendered, and the plaintiff appealed.

Maybin, for the plaintiff and appellee, contended, that as to the redhibitory vice of running away, the act of the legis-

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lature, in relation to the introduction of slaves into this state passed the 2nd January, 1834, raised the presumption that the slave was a runaway before the sale, if he eloped within two months afterwards. This is fully shown to be the case here.

2. It is true this presumption ceases, if the slave has been more than eight months in the state, but this is a matter to be shown by the defendant. It is a well settled rule that a party who is to be benefited by, or to avail himself of an exception or *proviso*, must show it as a matter of defence. See the case of the *United States vs. Haywood*, 2 *Gallison*, 497; also, 9 *Martin*, 47, and the principle settled in the case of the *Syndics of Morgan vs. Fiveash*, 8 *Martin*, N. S., 590.

Strawbridge, for the defendant. The rescission of the sale of this slave is claimed under the provisions of the statute of 1834, on the ground that he was in the habit of running away. Proof was made that he ran away within two months after the sale, but it is not alleged and proved that he had been brought into the state *within eight months*. This must be shown, for the statute only creates the presumption that such a slave is a runaway, when he has *not* been in the state *more than eight months*.

2. It would seem that it is solely a question of evidence when this slave was brought into the state; but it is urged that it is matter of pleading, and in that light it will be considered. The plaintiff is bound to set out every fact material to his case, whether it involves a positive or negative; he should, therefore, have set forth that the slave had ran away within two months after sale, and had not been in the state more than eight months previously.

3. The plaintiff has not even set out the rule or provision of law on which he relies; but only alleges the redhibitory vice of running away, and states that the slave ran away "a few days after the sale, etc." If he does not state the rule, the defendant is not bound to plead the exception; or if he does not set out the statute, and rely on its provisions specially, how can the defendant plead the exception which

it contains? The rule of the common law is, if there be in "a clause (in a statute) which is pleaded, a *proviso*, or exception, this must be cited, although it make against the party reciting it." 7 *Bacon's Abridgment*, title *Statute*, letter *L*, page 395. 1 *Chitty's Pleading*, 229. *Hicks vs. Calvit*, 5 *Martin*, 691. 9 *ibid.*, 47.

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4. But this is not a matter of pleading; it is a question of proof. The plaintiff is bound to allege the facts on which he relies, but he is not required to set forth the evidence by which he means to prove those facts. He has not shown that the slave in question has been in the state less than eight months, which is necessary to establish the redhibitory vice of a *runaway*; and are we to presume that a slave, of which we know nothing, has been in the state less than eight months, or that he is a stranger, and but recently brought here? In the absence of all proof, any man, black or white, must be presumed a resident of the place where he is found.

5. The plaintiff, in order to rebut this presumption, was bound to show that the slave had been brought into the state *within* eight months. He has neglected this, and must take the consequences. The redhibitory vice of a *runaway* is not established without this being shown, and the plaintiff fails in his action.

Martin, J., delivered the opinion of the court.

The plaintiff seeks to set aside a judgment of non-suit, and to obtain the rescission of a sale of a slave sold him by the defendant's testator. The general issue was pleaded.

The slave was sold on the 12th of May, 1835; was sent to the plaintiff's plantation two or three days afterwards, and on the twenty-seventh of the same month ran away, and has never since been heard of. The testimony shows that the defendant admitted his liability, but urged that it ought to be restricted to one-half, as he had no greater interest in the slave sold.

By the act of assembly of 1834, section 3, and page 7, it is provided, that in redhibitory actions, on the score of the

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The plaintiff is bound to set out every fact material to his case, whether it involves a positive or negative; but he is not required to allege the absence or non-existence of facts which might defeat his action.

In a redhibitory action, under the statute of 1834, which presumes a certain class of slaves, *runaways at the time of sale*, if they elope within sixty days afterwards: it is sufficient to allege that the slave in question, *run away* within a few days after the sale, when the evidence shows it was *less* than sixty.

So, if the infliction of unusual punishment is proved, or it is shown the slave has been in the state more than eight months, it destroys the presumption of law that a redhibitory vice existed at the time of sale; but the plaintiff is not required to allege that neither of these facts existed.

Exceptions which come in by way of *proviso*, or in a sub-

slave being a runaway, the plaintiff shall not be bound to prove, that the habit of running away existed before the sale, when the vice is discovered within two months after it.

But the defendant contends, that the plaintiff was properly non-suited, because the petition does not state that the slave had not been eight months in the state; neither was this proved.

He further urges, that the plaintiff is bound to set out every fact material to his case, and this is required, whether such fact involves a positive or negative.

This we admit. It is true, the petition alleges that the slave ran away a few days after the sale; while it is contended, that it ought to have been alleged, that the running away was within sixty. The expression, a few days, perhaps excludes a greater number of days, than that which constitutes the next division of time, a week or a month. On this, we express no opinion, as the number of days has, by evidence, introduced without any objection, been shown to be less than sixty, *to wit*: fifteen.

Although the plaintiff be bound to state every fact which is necessary to maintain his action, he is under no obligation to aver the absence or non-existence of facts which may defeat it. The infliction of unusual chastisement is a fact, which, if proved, would have defeated his right to the presumption created by the act of 1834, as well as proof of the slave having resided more than eight months in the state before the sale; yet even the counsel of the defendant has not contended, that the plaintiff ought to have averred that no unusual chastisement had been inflicted.

He urges, that the rule of the common law is, that if there be, in the clause of a statute which is pleaded, *any proviso* or exception, this must be cited, though it make against the party reciting it. 7 *Bacon's Abr. tit. Statute, letter L., page 395.*

Bacon, in the article from which this quotation is taken, treats of the *pleadings* of statutes. The statutes, therefore, he speaks of, must be private ones, which alone are to be pleaded; public ones need not be. In this article, however,

and within a very few paragraphs, he says, "That no person is obliged to recite in pleading, any more of a statute, than the clause which makes for himself." *Idem.*

The plaintiff's counsel has replied, that it is a "well settled rule, that a party who is to be benefited by, or to avail himself of, an exception or proviso, must show it. Judge Story, in the case of the *United States vs. Haywood*, 2 *Gallison*, 497, says, "exceptions which come in by way of proviso, or in subsequent statutes, are properly matter of defence for the defendant." See *The Margaret; Haley, claimant*, 9 *Wheaton*, 421.

In the case of *Hicks and Wife vs. Martin*, 9 *Martin*, 47, it was held, that the plaintiff who claimed the forfeiture of the right to a slave, on its removal from Virginia, by a tenant in dower, without the consent of the heir, was bound to allege and prove the absence of that consent. The court say, that although it be a general rule, that the negative is not to be proved, it does not apply to a case, in which a party charges the other with a culpable omission or breach of duty; for it is one of the first principles of justice, not to presume that a person has acted illegally. This case cited by defendant's counsel, does not appear applicable to the present.

He further contends, that the presumption must be, that the slave had been more than eight months in the state before the sale; because the very greatest part of the slaves in the state have been so.

If this be a violent presumption, which is equivalent to a proof, the defendant must have entitled himself to the use of it by averring the fact. It appears to us, indeed, the weak presumption which moves not at all. The very greatest part of the inhabitants of New-Orleans, are citizens of the United States; yet the inhabitant who claims the rights of a citizen, will not successfully claim it, on the presumption arising from this circumstance. The very greatest part of those inhabitants pay some tax; yet, the voter at the poll, is rejected, if he does not show that he himself has paid a tax.

It very seldom happens, that the purchaser of a slave, from a negro trader, or stranger, can show, whether or not the

EASTERN DIST.
January, 1839.

MATHEWS

vs.

PASCAL'S EX'RS.
sequent statute
are properly
matters of de-
fence. So, a
proviso in the
registry act, be-
ing by way of
exception from
the enacting
clause, need not
be taken notice
of in a libel to
enforce the for-
feiture. It is
matter of de-
fence to be set
up by the party
in his claim. 9
Wheaton, 421.

But it has been
held, that a
plaintiff who
claimed the for-
feiture of a slave,
on its removal
from Virginia
by a tenant in
dower, without
the consent of the
reversioner, or
heir, was bound
to allege and
prove the ab-
sence of that con-
sent.

It is a general
rule, that the ne-
gative is not to
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this does not ap-
ply to a case in
which a party
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other with a cul-
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ty; for it is one
of the first prin-
ciples of justice
not to presume
that a person
acted illegally.

Where the
plaintiff sues un-
der the act of
1834, which cre-
ates the pre-

EASTERN DIST. slave has been eight months in the state. It very seldom happens, however, that the vendor cannot, or is unable to make this proof.

HEBERT
vs.
HUDSON ET AL.
sumption that the slave, who ran away within two months after sale, was a runaway before the sale, and gives rise to the redhibitory action against the seller; *provided*, such a slave had not been in the state *more than eight months*: *Held*, that the plaintiff need not allege and prove the fact. It is for the defendant to show that he comes within the *proviso*, as a matter of defence.

It is a good rule, to require the production of evidence from him, who is presumed to have it in his power; and there is a peculiar reason to enforce this rule in a case like the present.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; that the sale of the slave Dempsey be rescinded, and that the plaintiff recover from the defendant the sum of eight hundred dollars, to be paid by the latter in the due course of the administration of his testator's estate, with costs of suit in both courts.

HEBERT vs. HUDSON AND LAMBETH.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

Where two estates are adjacent to each other, the one below owes to the other, a natural servitude, to receive the waters which run naturally from it. See *Martin vs. Jett*, 12 *Louisiana Reports*, 501.

If the owner of the lower estate, owing the servitude, makes a levee, or other obstruction to the natural flow of the water over his land from the upper one, the owner of the latter has his action to cause the obstructions to be removed.

This is an action in which the plaintiff seeks to have a certain levee or embankment, constructed by the defendants below him, removed, as obstructing the natural flow of the waters from his plantation situated above. He alleges that the defendants, whose plantations front on a coulée or bayou

Goula below him, in the parish of Iberville, have built a levee or embankment, and cut ditches, so as to obstruct the natural flow of the water from his plantation above, which has caused him great injury, by daming up the waters, and causing them to overflow his lands. He contends, that the lower plantations owe a servitude for the natural flow of the waters from his over their lands, and prays that the levee or embankment be removed, and the obstruction abated, with damages, etc.

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January, 1839.

HEBERT
vs.
HUDSON ET AL.

The defendants pleaded a general denial, and set up various matters in defence. The cause was submitted to a jury, who ordered the embankment to be taken away; and from judgment confirming the verdict of the jury, the defendants appealed.

The case has been considered and decided as to the law applicable to it, on the principles settled in the case of *Martin vs. Jett*, 12 *Louisiana Reports*, 501.

Edwards, for the plaintiff.

Labauve, for the appellants.

Bullard, J., delivered the opinion of the court.

The defendants are appellants from a judgment which condemns them to remove a dam or levee, raised by them across a drain or *coulée*, by which the servitude due by their estate to that of the plaintiff, to receive the water which naturally flows from above, was obstructed; and the land of the latter was exposed to overflow. The case was tried in the first instance by a jury, who found for the plaintiff. It turns principally upon matters of fact, which are of the peculiar province of a jury of the vicinage; and a careful examination of the evidence has failed to satisfy us, that they came to an erroneous conclusion. The doctrine of the code in relation to this species of servitude, is simple and clear, and was considered by us in a recent case in the western district. *Martin vs. Jett*, 12 *Louisiana Reports*, 501. It does not appear to us, that the judgment in the present case militates against the interpretation then given to this part of the code.

EASTERN DIST. It is, therefore, ordered, adjudged and decreed, that the
January, 1839. judgment of the District Court be affirmed with costs.

SLACK
vs.
ORILLION.

SLACK vs. ORILLION.

**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF IBERVILLE, THE JUDGE THEREOF PRESIDING.**

Where certain lots or tracts of land have been located, surveyed and patented, the surveyor general cannot make a subsequent location of another claim, so as to interfere with, or affect the location of the original survey made by his predecessor, under which the land in dispute was sold and patented.

A special act of congress granting a tract of land, within certain defined and precise boundaries, is equivalent to a patent, and will hold the land against any previous claims not located or fixed by precise boundaries.

This case has already been before the court. See 11 *Louisiana Reports*, 587. The facts material to the cause are there fully stated. It was remanded principally on the ground that the district judge had misdirected the jury in his charge to them.

On the return of the cause, it was tried before the court alone, on nearly the same evidence and facts as on the first trial.

The district judge gave judgment for the defendants, decreeing to them, the three lots or tracts of land, held under patents from the United States; and dismissed the plea in reconvention, in regard to the remainder of the plaintiff's claim. The plaintiff appealed.

Winchester & Ives, for the plaintiff and appellant.

Labauve, for the defendants.

Bullard, J., delivered the opinion of the court.

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BLACK
vs.
ORILLION.

This case was before us at February term, 1838, and then remanded for a new trial. The last trial resulted in a judgment in favor of the defendant, from which the plaintiff prosecuted the present appeal. For the principal facts of the case, we refer to the opinion first delivered. 11 *Louisiana Reports*, 587.

In addition to the evidence before us on the former appeal, the defendants exhibit a plat, certified by the surveyor general, to be "a true sketch from the plat of the original surveys, made of lots on the Bayou Grosse Tête, on file in his office." This document proves that lots No. 26, 27 and 28, as described in the several patents, are contiguous to each other. The patents themselves, refer to an official plat of the survey of said lands, returned to the general land office by the surveyor general. We are to presume, that the sketch now presented, represents truly the survey to which the patent refers, and is the original from which the plat returned to the general land office was taken. In locating the plaintiff's claim therefore, in 1830, the surveyor general overlooked or disregarded the former original and official survey, made by his predecessor, in conformity to which the land claimed by the defendants was sold and patented. It is clear that that location alone cannot affect the title of the patentee.

Where certain lots or tracts of land have been located, surveyed, and patented, the surveyor general cannot make a subsequent location of another claim so as to interfere with or affect the location of the original survey made by his predecessor, under which the land in dispute was sold and patented.

But, it is contended, that the plaintiffs had a previous survey or location, and a confirmation by act of congress, giving them a well defined tract of land, conforming to a survey, made in 1808, and which was filed with their claim; and that their case must be governed by that of *Boatner vs. Walker*; in other words, that the confirmation according to that plat, is equivalent to a patent, and being of anterior date, must prevail.

There is nothing in the record to show, that the commissioners recommended a confirmation, with reference to any particular survey; nor has any act of congress been shown, which confirms it with definite and specific boundaries. In this respect, the case differs materially, from that above mentioned, in which there was shown a special act of congress,

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**BARON'S WIDOW
AND HEIRS
vs.
HODGE.**

A special act of congress granting a tract of land within certain defined and precise boundaries, is equivalent to a patent, and will hold the land against any previous claims not located or fixed by precise boundaries.

granting a tract of land, within certain and precise boundaries. The survey of 1808, appears never to have been noticed by the commissioners, nor is any reference made to it in any act of congress, to which our attention has been directed; and on comparing that survey with that of 1830, the courses and distances do not appear to coincide. We are not, therefore, satisfied, that there had been previously to 1826, the date of the patents, any appropriation of the *locus in quo*, which was conclusive upon the government, and the case is strongly analogous to that of *Lefebvre vs. Comeau*, 11 *Louisiana Reports*, 321. The patentees have, in our opinion, the best title to the three lots in question.

The defendants are without interest to contest the plaintiff's title, any further than as it relates to the land covered by their patents; and it is consequently superfluous to inquire, whether in point of fact, the claims of Franchebois & Reboul were confirmed by the acts of congress, as certified by the register. Even admitting that they were so confirmed, the patents of 1826 must prevail.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

BARON'S WIDOW AND HEIRS vs. HODGE.

**APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

An insolvent succession, the administration of which is refused, or will not be accepted by the beneficiary heirs, their agent, tutor, or curator, may be surrendered to the creditors, who are authorized to appoint syndics to administer thereon.

So, where the widow and tutrix of the minor children provoked the meet-

ing of creditors of the insolvent estate of her deceased husband, abandoned the administration, and appeared in the *concurso*, and voted for syndics; *Held*, that she was thereby precluded from making any opposition to the proceedings previously had in the matter.

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BARON'S WIDOW
AND HEIRS
VS.
HODGE.

"This is an opposition on the part of Laure Bringier, widow of N. A. Baron, jr., to the confirmation and homologation of a sale made to Andrew Hodge, of certain property of the estate of the deceased, for the many grounds set forth in the opposition.

The opposition is made by the widow, as the tutrix of her minor children, the legal heirs of said Baron, their father; she appears as plaintiff in reconvention, and demands that said sale be cancelled, for the causes set forth in her petition, and claims of said Hodge the sum of twenty thousand dollars, damages, for the illegal detention of the property by Hodge, and for the rents and profits thereof.

Andrew Hodge, in answer to the petition of the said tutrix, denies the allegations contained in her opposition, and prays for a judgment in his favor, against Mrs. Baron personally, for her vexatious interference herein.

The proceedings in the succession, and the evidence adduced on the trial of the present opposition, show that L. M. Reynaud, and Laure Bringier, the widow of N. A. Baron, were the testamentary executors of the deceased, and have acted in that capacity up to the 10th February, 1835, when their functions having expired, they informed the court, by petition, that owing to the late pressure and pecuniary distress of the country, it has been impossible to sell, without a sacrifice, the immoveables left by the deceased, in order to liquidate the estate; that most of the debts of the estate have been paid by the late firm of Baron, jr., & Co., who are, by reason thereof, creditors of the estate in a large sum of money; that, besides this large sum, the succession has other debts, the amount of which exceeds the value of the unsold property of the estate; that they are unable to give the bond and security required by law, should their administration be continued one year longer; that none of the persons entitled by law to the administration of the estate, are

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AND HEIRS
VS.
HODGE.**

willing to accept of the same; that under such circumstances they are advised to call upon the court, to convene a meeting of the creditors of the estate, a list of whom, so far as known, was annexed to their petition, etc.

The court, by their decree of the 10th February, 1835, ordered the said meeting before Felix Grima, notary public, on the 16th day of March, 1835; the creditors then and there met, and appointed François Gardère their syndic; And Laure Bringier appeared at the said meeting, as a creditor of the deceased, and voted for the said Gardère as syndic.

The proceedings before the court, from the opening of the succession to the present controversy, indicate none of those errors or informalities that should determine the court to maintain the present opposition to the confirmation and homologation of the sale, made by the syndic of the creditors of the deceased, to Andrew Hodge.

It is, therefore, ordered, adjudged and decreed, that the same be overruled and dismissed."

From this judgment, the plaintiffs in the opposition appealed.

Hennen, and *I. W. Smith*, for the appellants, contended, that from the moment of the decease of Baron, the right of ownership and possession of all the property in question vested in his heirs. Actual acceptance of an inheritance is no longer necessary; it is presumed by law. *Civil Code of 1808*, page 162, articles 73, 74. *Amendments*, pages 114, 115. *Louisiana Code*, 934, 943, 1007, 1010, 1011. 2 *Louisiana Reports*, 303. *Locré Legislation Civile*, pages 180 181, 252. *Pothier Traité des Successions*, chapter 3, section 3. 4 *Toullier*, numbers 79, 88.

2. The proceedings of the creditors are void, because if the executors were authorized to provoke the meeting, they supplied the place of syndics, and should have administered the estate as an insolvent succession, if there was evidence of its being such. But no proof of insolvency was made, and for this reason the proceedings are void. *Louisiana Code*,

1663, 1166. *Code of Practice*, 1038. 2 *Louisiana Reports*, 48. 2 *ibid.*, 148. 4 *ibid.*, 382. 6 *Martin, N. S.*, 586. EASTERN DIST.
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3. The vote of the tutrix at the meeting of creditors was illegal, because her interest was opposed to that of the minor heirs, who could only be legally represented by the under tutor. *Louisiana Code*, 301. 3 *Louisiana Reports*, 146. It was illegal, because the rights of the appellants, as creditors of their father, were extinguished by confusion at his decease. *ibid.*, 2014.

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AND HEIRS
vs.
HODGE.

4. The acts of the tutrix at the meeting of the creditors could not affect the rights of the appellants, because she was not cited, nor was she authorized to act upon their title to the property in question, and because they are creditors only. *Louisiana Code*, 334, 2265. 4 *Louisiana Reports*, 484, 498.

L. Peirce, contra. The act of 1826 requires syndics to be appointed, when no person will act as administrator. The plaintiff herself averred the insolvency of the estate, and required a meeting of the creditors.

2. They were summoned, met, and deliberated, and none offered to act, or required any other or further proceedings. The plaintiff, as the largest creditor, and as tutrix, voted for the syndic, and pointed out the time and manner of selling the estate, which were followed by the syndic.

Bullard, J., delivered the opinion of the court.

This is an appeal from the judgment of the Court of Probates overruling the opposition of the appellant to the homologation of a sale under the authority of that court, the purchasers having proceeded by monition under the statute of 1834.

Various grounds of opposition, and nullity in the proceedings were set up, but by an explicit waiver of record, most of them have been abandoned. The parties submit to this court only the questions, whether it was competent for the creditors to appoint a syndic to administer the estate of Baron, and whether the appellant is barred by her own appearance at the *concurso*.

An insolvent
succession, the
administration
of which is re-
fused or will not
be accepted by
the beneficiary
heirs, their

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agent, tutor, or
curator, may be
surrendered to
the creditors,
who are authori-
zed to appoint
syndics to admin-
ister thereon.

So, where the
widow and tu-
trix of the mi-
nor children
provoked the
meeting of cre-
ditors of the in-
solvent estate of
her deceased
husband, aban-
doned the admi-
nistration, and
appeared in the
concurso and vo-
ted for syndics:
Held, that she
was thereby pre-
cluded from
making any op-
position to the
proceedings
previously had
in the matter.

The succession was clearly insolvent, and it appears to us to come under the provisions of the 7th section of the "act of 1826, entitled an act supplementary to an act entitled an act relative to the voluntary surrender of property, etc.," which provides, that when a succession shall have been accepted under benefit of inventory, and neither the beneficiary heirs, their agent, tutor, or curators, will accept the administration, it may be surrendered to the creditors, who are authorized to proceed and appoint a syndic. In the present case, the appellant, who was tutrix of the minor children, provoked the meeting of the creditors, and abandoned the administration. The same rules relative to the administration by syndics in ordinary cases of surrender, apply to successions thus abandoned.

The appellant not only surrendered the administration and provoked a meeting of the creditors, but she appeared at the *concurso*, and voted for syndic, and we are of opinion that she is thereby precluded from making any opposition to the proceedings previously had in the premises.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

TAYLOR vs. DRANE.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT FOR THE
PARISH OF EAST FELICIANA, THE JUDGE THEREOF PRESIDING.

An endorser cannot attach property of the maker of a note not yet due, on the ground that he endorsed as surety, and that the latter is about to remove with his property permanently from the state, before the note becomes due.

This is not a proper case for attachment, as the plaintiff does not show an existing debt due to him by the defendant, nor an absolute liability incurred as surety.

13L 62
49 938

13 62
121 796

This suit commenced by attachment. The plaintiff alleges he endorsed a note as surety for the defendant, who is the maker thereof for two thousand four hundred dollars, dated in March, 1828, and payable one year thereafter, at the office of the Clinton and Port Hudson Rail Road Company, at Jackson, in this state.

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VS.
DRAKE.

He further alleges, that the defendant is about to remove with his property, permanently from the state, before said note becomes due, without leaving in it sufficient to pay the same at maturity; wherefore he prays for an attachment against the property of the defendant, to be held as an indemnity, to secure him against his endorsement, in an amount sufficient to meet the note when it becomes due, for the payment of which he is personally liable. He prays for general relief.

At the foot of the petition the plaintiffs swears, "that the facts set forth are true; that he did endorse said note as surety; that the drawer is about to quit and leave the state forever, and to remove his property without the same, before the time when said note will become due, and that this affiant expects to have to pay the same."

The defendant excepted to the proceedings, and averred that the matters set forth were *untrue*; and even if they were true, they were insufficient to authorize an attachment. He prays that the petition and attachment be dismissed.

On hearing the case on these exceptions, the district judge sustained the second exception, and dismissed the attachment. The plaintiff appealed.

Lyons, for the plaintiff.

The question involved in this case is: can the endorser of an accommodation note in bank, have the remedy of attachment against the drawer, *prior* to the maturity of the note, when the drawer is about to remove himself and his property out of the state, and where it appears almost reduced to a certainty, that the endorser will have the note to pay?

The main ground taken by the court below, and upon which the attachment was ordered to be dismissed, was, that

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there was no indebtedness between the drawer and endorser ; and that such indebtedness could only take place upon the happening of a future uncertain event, as protest, notice, etc. In this, the court below erred : Because,

2. There is a species of relationship of debtor and creditor existing between the drawer and endorser of such a note ; for the drawer procures the money upon the faith of the endorser's signature, on which the bank in most cases mainly relies. The bank *would*, probably, never have recourse to any conservatory process against the drawer ; the court below says the endorser *can* not, and thus he would be left without protection through the bank, and unable to protect himself. A wrong without a remedy.

But the conservatory process of injunction, lies to prevent any act, which if consummated, would afford ground for a claim to damages. (See *Carraby et al. vs. Morgan*, 5 *Martin, N. S.*, 501.) And why should not this plaintiff hold the property of defendant (upon the faith of which he probably endorsed his note) under attachment, to prevent the damages which it and its owner's removal from the state must necessarily cause ?

3. If then the drawer of the note stands in the relation of debtor to the endorser, has he not a right to have an attachment, as on a debt or *obligation* not yet due. (See *act of 7th April, 1826, section 7.*)—word "*obligation.*"

Sterrett and Boyle, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment dissolving his attachment. He sues for an indemnity, alleging that he is the endorser of the defendant on his promissory note, negotiated to the bank in Clinton, but not yet due ; and that the maker is about permanently to remove from the state, and to take away his property.

We concur with our learned brother of the District Court, that this is not a proper case for attachment. The affidavit is insufficient, in our opinion. It does not show an existing

debt due to him by the defendant, nor an absolute liability yet incurred as surety. EASTERN DIST.
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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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vs.
AMACKER.

KEMP vs. AMACKER.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT FOR THE
PARISH OF ST. HELENA, THE JUDGE THEREOF PRESIDING.

In an action of slander for damages, in consequence of slanderous words spoken, the defendant cannot reconvene for slanderous words alleged to have been uttered by the plaintiff against him.

The demand in reconvention, in an action for slanderous words spoken, is not necessarily connected with, and incidental to the principal one, as is required by law.

This is an action of slander, to recover damages for slanderous words spoken by the defendant concerning the plaintiff.

The defendant pleaded a general denial; and reconvened in damages, for certain slanderous words alleged to have been uttered by the plaintiff against him.

On the trial, on motion of the plaintiff's attorney, the demand in reconvention was struck out. The cause was then submitted to a jury, who returned a verdict for the plaintiff of seventy-five dollars in damages, and from judgment rendered thereon, the defendant appealed.

Davidson and *Penn*, for the appellant, contended that so far as the judgment condemned him to pay costs it was erroneous, because there was no proof of an amicable demand, although it is specially denied in the answer. If the amica-

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ble demand be denied and not proven, the plaintiff must pay the costs of suit. 7 *Martin, N. S.*, 265. 8 *ibid.* 117. 4 *Louisiana Reports*, 151.

2. The evidence does not support the verdict of the jury, consequently the judgment should be reversed.

Bullard, J., delivered the opinion of the court.

This is an action of slander, to which there was a plea of the general issue, and the defendant attempted to reconvene for slanderous words, alleged to have been uttered by the plaintiff against him.

On motion of the plaintiff's attorney, the reconventional demand was struck out; and after verdict and judgment against him, the defendant appealed.

The court, in our opinion, did not err. The demand in reconvention was not necessarily connected with, and incidental to the principal one, as required by the code. *Code of Practice*, article 374, 375.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

THOMPSON vs. HUTCHISS, TUTOR, ETC.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF WEST
BATON ROUGE.**

The creditor of a succession, inherited by minors, under the tutorship of the administrator, cannot institute suit for the removal of the tutor for malversation in office. No one can institute this action, without being properly authorized by the Court of Probates, as required by the article 1016, of the Code of Practice.

The plaintiff alleges, that he is a creditor of the estate of

one James Hackett, deceased, now in the hands, and administered by the defendant, as tutor of the minor children of the deceased, and that he has an interest in the ultimate solvency of said estate. He then states, that for certain causes and conduct of the defendant, he is incapable, and cannot to be safely trusted with the administration thereof, and prays that he be required to render an account; that he be also removed from the tutorship of said minors; and that the administration of said estate be taken from him.

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HUTCHISS.

The defendant averred, that the petition contained no cause of action; and set up various matters in defence.

After hearing the parties, the judge of probates rendered judgment, requiring the defendant to render an account; that he be also removed from the office of tutor; and that the under tutor attend, and cause another tutor to be appointed.

From this judgment, after an unsuccessful attempt to obtain a new trial, the defendant appealed.

Labauve, for the defendant and appellants.

Martin, J., delivered the opinion of the court.

The plaintiff states himself to be a creditor, and concerned in the solvency of the estate of Hackett, and suggests the malversation of the defendant, as administrator of the estate, and tutor of the minor heirs; prays that he may be ordered to render his account, and be dismissed from the tutorship. There was judgment against the defendant accordingly, and he appealed.

The creditor of a succession inherited by minors, under the tutorship of the administrator, cannot institute suit for the removal of the tutor for malversation in office. No one can institute this action without being properly authorized by the Court of Probates, as required by the article 1016 of the Code of Practice.

It is clear that the court erred in dismissing him from the tutorship, although it is the duty of every person to communicate to the Court of Probates, any fact within his knowledge, on which a tutor ought to be removed. *Code of Practice*, art. 1015. No one is authorized to institute the action for the removal, without being properly authorized so to do by the Court of Probates. The article 1016, provides that the judge when made acquainted with such fact, if he think there be probable cause for removal, shall direct the subro-

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VS.
MAYOR ET AL.

gated tutor or curator *ad lites* of such minor, to prosecute the removal; or if the said minor has no subrogated tutor or curator *ad lites*, he shall appoint a curator *ad hoc* to commence the action.

In the present case, the record shows that there was a subrogated tutor, who intervened, and evinced his disapprobation of the removal of the tutor.

The plaintiff's application ought to have been dismissed. We have refrained from examining, whether the judge of probates ought not to have ordered the subrogated tutor to institute an action for the removal of the tutor; because, it has appeared to us, that the plaintiff has not the right to demand the amendment of the judgment in this respect, and if he had, he has not exercised it. The judge of the Court of Probates needs not the expression of our opinion on the propriety of the tutor's removal, who may, without it, order a suit to be instituted therefor, on the information before him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be reversed, the suit dismissed at plaintiff's costs, together with costs of appeal.

MILNE VS. MAYOR ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The town of Milneburg, on the margin of the lake at Port Pontchartrain, is considered to lie within the incorporated limits of New-Orleans, and subject to the operation of the city ordinances and police regulations.

Where the act of incorporation does not expressly include the inhabitants of a certain place within the city limits, yet if they considered them-

selves residents within the limits of the city, and enjoyed the rights of the other corporators for a long time, this will be adopted as a practical interpretation of the law, as embracing and subjecting them to the police regulations.

EASTERN DIST.
January, 1899.

MILNE
VS.
MAYOR ET AL.

This case depends entirely on the construction of the boundary clause, in the act of the legislature, passed in 1812, defining the chartered limits of the city of New-Orleans.

The plaintiff shows, that he laid out a town in 1831, at the end of the Pontchartrain Rail Road, on the margin of the lake, which he called Milneburg. He now resists the right of the city authorities of New-Orleans to extend their ordinances and police regulations to his town, and to require taxes, tavern licenses, &c. to be paid by him and the inhabitants thereof.

He prayed that the city authorities be perpetually enjoined from exercising such authority, and that the corporation be condemned to pay him ten thousand dollars in damages for injuries sustained, &c.

The defendants pleaded a general denial.

After hearing testimony and examining the acts of incorporation of the city of New-Orleans, the district judge gave judgment for the defendants. The plaintiff appealed.

The clause of the act of incorporation relied on, and the evidence, are set out in the opinion of this court, which follows :

Preston, for the plaintiff.

Hoa, contra.

Carleton, J., delivered the opinion of the court.

The petitioner complains, that the mayor, aldermen and inhabitants of New-Orleans, have extended their municipal authority to Milneburg, a town which he caused to be laid out in 1831, at the margin of Lake Pontchartrain, on his own lands, which, he avers, are not within the incorporated limits of the city ; that they have interfered with the sale of his lots, and exacted heavy taxes from the keepers of taverns

EASTERN DIST.
January, 1839.

MILNE
vs.

MAYOR ET AL.

The town of Milneburg, on the margin of the lake at Port Pontchartrain, is considered to lie within the incorporated limits of New-Orleans, and subject to the operations of the city ordinances and police regulations.

and boarding houses there, to his damage, in the sum of ten thousand dollars, for which he prays judgment, and that the defendants be perpetually enjoined from the further exercise of such authority.

The defendants assert their jurisdiction to be rightly exercised, and the court below being of opinion that Milneburg, (Port Pontchartrain,) was within the incorporated limits of New-Orleans, gave judgement for the defendants, and the plaintiff appealed.

Whether Milneburg was within the incorporated limits of New-Orleans at the period referred to by the parties, is the only question presented for our solution.

By a law of 1812, it is declared, "that the limits of the city of New-Orleans shall be comprehended in the following boundaries, viz. beginning at the Nuns' Plantation above, and extending below as far as the *Canal des Pêcheurs*, including the settlements of the Bayou St. Jean."

G. Préval, a witness for the defendants, testified, that since the year 1809, the inhabitants of Gentilly, as well as of the shores of the Bayou St. Jean, have always voted at the city elections, enjoyed all the rights and privileges of its other citizens, and have been subject to all the ordinances and regulations affecting the inhabitants of the non-incorporated suburbs of the city; that these facts have come to his knowledge from having presided as judge of several elections, and from having acted as secretary of the city council for seven or eight years.

D. Prieur, the mayor, testified, that since the establishment of the Pontchartrain Rail Road, the corporation of the city has exercised jurisdiction over the inhabitants at the lake, as well as those of Gentilly and the Bayou St. Jean, and that they have voted in the city elections; that in 1831, the plaintiff, A. Milne, submitted a plan of his town at the termination of the rail road at the lake, to the city council, in obedience to an ordinance to that effect, which was accordingly approved.

It is true that the law leaves the limits of the city quite vague and indefinite, and doubts may well arise as to its true

meaning. Nevertheless, the practical interpretation given to it for a number of years by those most interested in understanding its true import, cannot be without its influence upon the question. Though the inhabitants of Gentilly be not *eo nomine* specified in the law, yet it appears from the testimony of the witnesses, that they have considered themselves within the limits of the city, and enjoyed the rights of the other corporators, since the year 1809. So the inhabitants of Milneburg, (Port Pontchartrain,) though not expressly mentioned in the law, have given it the same practical interpretation, and exercised and enjoyed all the rights of citizens, and been under the police of the city regulations, since the first establishment of that town. This construction of law has been expressly settled by the act of the legislature of 1836, by which the city was divided into separate municipalities.

After much reflection, we think it safest to adopt this practical interpretation given to the act of 1812, and perceive, therefore, no good reason for disturbing the judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.
January, 1839.

PHILLIPS

vs.

CARR.

Where the act of incorporation does not expressly include the inhabitants of a certain place within the city limits, yet if they considered themselves residents within the limits of the city, and enjoyed the rights of the other corporations for a long time, this will be adopted as a practical interpretation of the law, as embracing and subjecting them to the police regulations.

PHILLIPS vs. CARR.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF POINT COUPEE, THE JUDGE THEREOF PRESIDING.

The maker of a note has an interest to show that his vendor handed it over to the payee and endorser to sue as a *bona fide* holder, and deprive him of the plea of failure of consideration. He has a right to interrogate the plaintiff on oath, if he is the true owner; and to have the case remanded for this purpose if it has been refused.

EASTERN DIST.
January, 1839.

PHILLIPS
vs.
CARR.

This is an action by the payee against the maker of a promissory note.

The defendant excepted and denied that the plaintiff was the legal owner of the note sued on; but that he was only the endorser thereon. He further pleaded a general denial, and that no amicable demand had been made; and also averred that the note was given in payment to one Barnett, for the price of horses and cattle, which, from various causes and defects, were of little or no value, and that the consideration had entirely failed, all of which was well known to the plaintiff before he received said note.

He further propounds interrogatories for the plaintiff to answer on oath.

1. Are you the legal owner of the note sued on?
2. What was the consideration of said note?

On motion of the plaintiff's counsel, the first interrogatory was struck out. The cause was then set for trial.

There is no evidence in the record, but the judgment states on its face, that having heard the whole evidence and arguments of counsel, it is decreed that the plaintiff recover the amount of the note, interest and costs. The defendant appealed.

Watts for the plaintiff, insisted upon an affirmance of judgment. The defendant was not entitled to the benefit of the interrogatory struck out; because the answer admits Phillips was an accommodation endorser. If the defendant did not mean to pay the note, but to contest it with his creditor, (the vendor) he was bound to give Phillips notice not to pay, and to offer him an indemnity, otherwise he is bound to pay the holder.

2. There is nothing in the pleadings which shows any defence against Barnett, the original creditor.

McHenry for the defendant, contended that the court erred in not requiring the first interrogatory to be answered; and by allowing the cause to be set for trial before the second one was answered. A continuance was asked for, and should

have been granted. The case must, therefore, be remanded. *EASTERN DIST. 7 Martin, N. S., 12. 3 Louisiana Reports, 261. 5 ibid., 48., January, 1839. Code of Practice, 335. 1 Martin, N. S., 194, 544. 5 ibid., 70.*

PHILLIPS
VS.
CARR.

Martin, J., delivered the opinion of the court.

This is an action by the payee of a promissory note. The defendant pleaded, that the plaintiff was not the owner of the note; the general issue; and the failure of consideration, to the knowledge of the plaintiff.

He prayed that the plaintiff might be ordered to answer, on oath, the two following interrogatories. 1st. Are you the owner of the note? 2nd. What was the consideration thereof? On motion of the plaintiff, the first interrogatory was stricken out by the court, and the second was not answered.

The defendant objected to the cause being set for trial, on the ground that the second interrogatory was not answered. The objection was overruled, judgment was given for the plaintiff, and the defendant appealed.

His counsel complains that the court erred in striking out the first interrogatory.

The answer alleges that the note was given to Barnett, as the consideration of a sale of horses, and that the plaintiff had no interest therein, but endorsed it merely as the surety of the defendant. That the horses proved worthless, from redhibitory vices and diseases, so that the consideration of the note failed.

The defendant had an interest to show that Barnett, the vendor, was still the owner of the note, and that he had handed it over to the plaintiff to bring suit thereon as a *bona fide* holder, and thus deprive the defendant of the plea of failure of consideration.

The refusal or neglect of the plaintiff to answer the second interrogatory, presented no objection to the cause being set down for trial. The defendant's counsel has not contended that this refusal or neglect was an admission of the absence of consideration, and entitled him to judgment; had he

The maker of a note has an interest to show that his vendor handed it over to the payee, and endorsed, to sue as a *bona fide* holder, and deprive him of the plea of failure of consideration. He has a right to interrogate the plaintiff on oath, if he is the true owner, and to have the case remanded for this purpose if it has been refused.

EASTERN DIST. done so, the case would have presented a question, the
January, 1839. consideration of which his silence relieves us.

MORGAN
vs.
YARBOROUGH.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the first interrogatory reinstated, and ordered to be answered, and the case remanded for further proceedings according to law; the plaintiff and appellee paying the costs of the appeal.

MORGAN vs. YARBOROUGH.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE PARISH OF EAST FELICIANA, THE JUDGE OF THE EIGHTH PRESIDING.

Where the defendant sets up an equitable defence to his note, and charges fraud in the transfer of it to the plaintiff, to deprive him of this defence, the burden of proof of consideration, and that he came fairly by it, rests on the latter; and the *form of transfer* makes no difference, whether by a blank or special endorsement.

The record of a suit between others not only proves *rem ipsam*, to wit, that such judgment was recovered, but also a sale of certain goods mentioned in it. It does not, however, prove that the same goods were purchased by the defendant, as the consideration of the note sued on, and sold as the property of his vendor.

A bill of goods purchased by the defendant, is not evidence in a suit between him and the transferee, of the note alleged to have been given for the price of them.

This is an action by the transferee against the maker of the following promissory note:

“*Dollars 432.* Twelve months after date, I promise to pay to G. W. Munday, or bearer, the sum of four hundred and

13L 76
 51 1107
 13 74
 111 929

thirty-two dollars, with ten per cent. interest from the date. **EASTERN DIST.**
Value received. "C. W. YARBOROUGH." **January, 1839.**

14th December, 1835."

"Witness—W. C. Whittaker."

Endorsed: "Pay the within note to Morgan Morgan,
November 26, 1836." **G. W. MUNDAY.**

**MORGAN
VS.
YARBOROUGH.**

The defendant averred that the note was obtained from him through fraud of the payee, and without any valid consideration, by pretending to sell to him certain groceries which he did not own, and never were received; that the plaintiff has no interest in said note, which has been transferred to prevent this defendant from setting up his equitable defence thereto. He denies that the plaintiff is the owner of the note.

Upon these pleadings and issues the parties went to trial.

There were three bills of exception taken and relied on by the defendant, which are fully stated in the opinion of the court which follows.

The plaintiff had a verdict and judgment, from which the defendant appealed.

T. L. Andrews, for the appellant, insisted that when fraud and want of consideration, were set up as a defence against a note by the maker, it devolves on the plaintiff to show that he came fairly in possession, and for a valuable consideration. 3 *Martin, N. S.*, 291, 392. 6 *ibid.*, 566. 5 *Louisiana Reports*, 49.

Lasson, contra.

Bullard, J., delivered the opinion of the court.

This is an action upon a promissory note, made payable to the payee or bearer, in the name of a bearer by special assignment and transfer. The defence set up is, that the note was obtained from him in fraud, and without any valid consideration; and that the present plaintiff has no interest in the note, but that it has been put into his hands to sue on in

EASTERN DIST. order to prevent the defendant from setting up his equitable
January, 1839. defence.

MORGAN
vs.
YARBOROUGH.

When the defendant sets up an equitable defence to his note and charges fraud in the transfer of it to the plaintiff to deprive him of this defence, the burden of proof of consideration and that he came fairly by it rests on the latter, and the form of transfer makes no difference, whether by a blank or special endorsement.

The record of a suit between others, not only proves *rem ipsam*, to wit, that such judgment was recovered, but also a sale of certain goods mentioned in it. It does not, however, appear that the same goods were purchased by the defendant as the consideration of the note sued on and sold as the property of his vendor.

A bill of goods purchased by the defendant is not evidence in a suit between him and the transferee of the note alleged to have been given for the price of them.

The case is before us upon several bills of exception, from the first of which it appears, that the judge charged the jury, that when an equitable defence is set up, and fraud in the transfer, to deprive the defendant of his defence, if the note be payable to bearer, or transferred by blank endorsement, the proof of consideration given for the note, and that the plaintiff came fairly by it, devolves upon the plaintiff; but that the case is different when the transfer is a special one, and that in such cases the proof devolves upon the defendant, to show the fraud and want of consideration.

In this part of the charge, we are of opinion the court erred in supposing that the form of the transfer makes any difference as to the burden of proof.

It further appears, that the record of a suit of *Dunn vs. Munday*, the original payee, was offered for the purpose of showing, that the property for which the note was given, was seized and sold, to satisfy a judgment against Munday, which was received only to prove *rem ipsam*, to wit, that such a judgment was recovered, but that it did not prove the facts stated in the record, or that a sale was made, as set forth in said judgment, and the jury was instructed that the record could be admitted to prove nothing else.

It appears to us the jury may have been misled by this charge of the court, which to a certain extent is correct, but erroneous so far as it goes to tell the jury that the record did not prove the sale of the goods mentioned in it. It is true it does not prove that the same goods, said to have been purchased by the defendant, were sold as the property of Munday; but the constable's return is, perhaps, the exclusive evidence, that certain goods seized by him in that suit were sold. The identity of the goods was a distinct question.

We think the court erred also, in admitting the bills of goods purchased in New-Orleans. It is not evidence under oath, and the simple signature of the alleged vendor does not prove, as to the present defendant, that such goods really were bought.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed ; and it is further ordered, that the case be remanded for a new trial, with instructions to the judge, to abstain from charging the jury as set forth in the bill of exceptions ; and that the appellee pay the costs of the appeal.

EASTERN DIST.
January, 1839.

BRUGIER
VS.
BIRON.

BRUGIER VS. BIRON.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where two persons, whose pretensions are about equal, claim to be appointed curator of a vacant estate, the first applying will be preferred, unless the one opposing *alleges and shows a better right*.

In this case, P. S. Biron applied to the judge of probates to be appointed curator of the vacant estate of Eugene Quezac, who died intestate in the city of New-Orleans.

Brugier made opposition to this application, and claimed the preference on the ground that he was a creditor of said estate in the sum of one hundred and seventy-four dollars. He further alleged, that Biron was neither a friend or a creditor of the deceased, and should not be appointed.

The judge of probates decided, that it appeared Biron first applied, and that he had caused the death of. Quezac to be recorded and the seals to be affixed, and paid the legal charges.

That Brugier paid certain accounts of the succession five days after Biron's application, which were liable to be contested ; and that neither of them showed any previous intimacy or friendship for the deceased ; wherefore, the first applicant is entitled to the curatorship. Brugier appealed.

EASTERN DIST. *Haines*, for the appellant, insisted that he should have
January, 1839. been preferred, because he was a creditor and the other was
 not. *Louisiana Code*, 1114.

BRUGIER
VS.
BIRON.

Thielen, contra.

Carleton, J., delivered the opinion of the court.

This is a contest between two applicants for the curatorship of the estate of Eugene Quezac, who died in this city on the 11th September, 1837.

Biron, the first applicant, filed his petition on the 13th, and Brugier his opposition on the 20th of the same month. Neither of them were creditors of the deceased. Biron caused the recording of the death of Quezac to be made, the seals to be affixed, and paid the legal charges therefor.

Two days after he filed his petition, Brugier paid the expenses of interment, and the unsettled accounts of two creditors of the deceased, both together amounting to a very inconsiderable sum.

The court overruled the opposition, conferred the curatorship on Biron, and Brugier appealed.

Where two persons, whose pretensions are about equal, claim to be appointed curator of a vacant estate, the first applying will be preferred, unless the one opposing alleges and shows a better right.

By the Code of Practice, article 972, it is provided, that this opposition can only be founded on the allegation of a better right on the part of the person claiming the tutorship, (in the French text, "*la curatelle*,") otherwise it shall be rejected with costs, and shall not prevent the confirming the tutorship, (*la curatelle*,) on the person demanding it, if he possess such requisites and give such security as the law calls for.

We do not think the court erred. Brugier did not show such better right as is contemplated by this law, and the court acted correctly in rejecting his pretensions and sustaining the first application.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

BRADFORD *vs.* DORTCH ET AL.

EASTERN DIST.
January, 1839.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF EAST FELICIANA, THE JUDGE OF THE EIGHTH PRESIDING.

BRADFORD
vs.
DORTCH ET AL.

Where a tract of land is sold for cash at the probate sale of a succession, and expressly declared to be subject to a lien in favor of the vendor, for the original *price* and interest, and the purchaser bids over this amount, he is entitled to the benefit of his bid, by paying the *overplus in cash*.

So, if the sum due the vendor has been seized in execution, the purchaser of the land at probate sale takes it subject to this claim, in whosoever hands it may come.

This suit commenced by injunction, to restrain the resale of a certain tract of land, which the plaintiff had purchased or was struck off to him, at the probate sale of the succession of George W. Dortch, deceased.

The facts of the case are fully stated and set forth in the opinion of this court, which follows.

The district judge presiding, non-suited the plaintiff, and dissolved the injunction, and he appealed.

Andrews and *Boyle* for the plaintiff and appellant.

Lawson, contra.

Carleton, J., delivered the opinion of the court.

The petitioner avers, that at a probate sale of the estate of G. W. Dortch, deceased, on the 11th April, 1834, he purchased as the last and highest bidder, for four thousand one hundred and fifty-five dollars, all the right, title and interest of the deceased, to a tract of land of 500 arpents, situated on Black Creek, in the parish of East Feliciana, and subject to a lien or privilege in favor of James Bradford, the vendor of the deceased, for the sum of three thousand eight hundred and fifty dollars; that the overplus of that sum was, according to the conditions of sale, to be paid in ready money to the defendant, E. G. Dortch, as the widow and tutrix of the minor children of the deceased; that he tendered to the parish judge, by whom the land was sold at auction, certain

EASTERN DIST.
January, 1839.

BRADFORD
vs.
DORTCH ET AL.

notes drawn by said James Bradford, for more than the amount due him on the price as vendor ; as also, three hundred dollars in cash, being the sum over and above the vendors privilege, for which the land was struck off to him, all of which was refused by the parish judge ; and that he therefore deposited the money in the Union Bank at Clinton ; that nevertheless, the judge has readvertised the land, and is about to sell it to the great damage of the petitioner, and concludes with a prayer, that the defendants and parish judge, as auctioneer, be perpetually enjoined from the resale of the land ; and that he be decreed to be the owner thereof, and of all the right, title and interest of the said deceased in the same.

The injunction was accordingly granted, until the further order of the court.

The defendants, for answer, insist that the plaintiff, from his own showing, is not entitled to recover ; that the land was advertised and sold for cash ; and that the whole of the four thousand one hundred and fifty-five dollars ought to have been tendered in money, and not the notes and surplus only over the amount of the vendor's lien ; further, that before the sale, all the rights and privilege of James Bradford, the vendor, were seized under a *fi. fa.*, at the suit of the Louisiana Bank, in virtue of a judgment against him ; that due notice thereof was given to the defendants, previous to the adjudication ; and that thereafter, all the rights of the vendor, were divested by a sheriff's sale, made to D. M. Bradford and Beauchamp.

The plaintiff obtained leave to file an amended petition, claiming one thousand dollars damages, which he alleges to be the value of the rents of the land while withheld from him.

The District Court gave judgment as of non-suit against the plaintiff, and he appealed.

According to the terms of sale, as fixed by the creditors of the deceased, and set out in the *procès verbal* thereof, it is stated that "the land and negroes will be sold for cash, the personal property on a credit of twelve months, purchasers to give notes with approved personal security, bearing an interest of ten per cent. per annum after due, until paid." The

proce~~s~~ verbal further declares, "the tract of land on Black Creek, being next offered for sale, and it being announced to the bidders, that it was subject to a lien in favor of James Bradford, for the purchase price and interest, and being often and repeatedly cried, was struck off to David Bradford, for the price and sum of four thousand one hundred and fifty-five dollars.

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January, 1839.

BRADFORD
vs.
DORTCH ET AL.

It appears, moreover, as is alleged in the defendants' answer, that a short time before the adjudication, the rights of James Bradford, the vendor, were seized at the suit of the Louisiana Bank, and notice thereof given to the defendants.

Under this statement of the case, the principal question to which our attention has been drawn is, whether, by this adjudication, all the right and title of the deceased to the land, passed to David Bradford, the plaintiff?

It appears to us, that inasmuch as the land was sold, subject to the lien of James Bradford, the vendor, all that could be required of the plaintiff was, that he should pay the overplus in money, which it is not disputed he offered to do. He could not be also required to pay in cash, the amount of the lien, for that would have been to contradict the very terms of the sale; and he would have still held the land liable to the vendor's claim, so that he might have been compelled to pay the same sum twice. This, we think, is the only effective and reasonable interpretation that can be given to the conditions of the sale, as disclosed in the *proces verbal*.

But the defendants' counsel insist, that the seizure by the Louisiana Bank, of the vendor's privilege, before the adjudication, and its subsequent sale, divested James Bradford of all his rights against the succession of Dortch. This is a question not necessary for us to decide, and we, therefore, express no opinion upon it. All the parties interested are not before us; and in whomsoever the privilege of the vendor may abide, whether in himself, or the purchaser under the seizure, is a matter to be settled with the plaintiff, who takes the land subject thereto.

Nor do we conceive, that the tender of the notes of James

Where a tract of land is sold for cash, at the probate sale of a succession, and expressly declared to be subject to a lien in favor of the vendor for the original price and interest, and the purchaser bids over this amount, he is entitled to the benefit of his bid, by paying the overplus in cash.

So, if the sum due the vendor has been seized in execution, the purchaser of the land at probate sale, takes it subject to this claim, in whose-soever hands it may come.

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January, 1839.

BEARD ET AL.
VS.
POYDRAS.

Bradford, to the amount of his privilege, by the plaintiff, can at all affect the merits of the case. The only point before us being, whether the plaintiff has complied with the terms of sale and adjudication, and we are of opinion he has complied with them, and that he thereby acquired all the right, title and interest of the deceased, G. W. Dortch, to the land in question.

With respect to the claim for damages set up by the plaintiff, the testimony is scant and unsatisfactory, and does not enable us to form any opinion upon the subject.

We think the court below erred in non-suiting the plaintiff; that the injunction ought to be reinstated, and made perpetual, and the cause remanded for further proceedings.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the injunction be reinstated and made perpetual; that this cause be remanded for further proceedings according to law, and that the appellees pay the costs of this appeal.

BEARD ET AL. VS. POYDRAS. *

**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
 PARISH OF POINT COUPRE, THE JUDGE OF THE SECOND PRESIDING.**

A *certiorari* will be refused, when it appears it is not in the power of the clerk to supply the defect in the record from documents in his office.

If it appears the appellant has been without fault, and prevented by acts of the adverse party from bringing up a complete record, the court may, in its discretion, send the case back for a new trial.

* This opinion was delivered in April, 1838, and suspended until this term.

When there is an agreement in the record that the case shall first be tried between the original parties, the warrantors need not be made parties to the appeal.

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January, 1839.

BEARD ET AL
VS.
POYDRAS.

When the record is incomplete, the case may still be set down for argument on any bill of exception, or matters apparent on the face of the record.

The plaintiffs in this case appealed from a judgment in favor of the defendant, Poydras. There were several persons called in warranty, but the parties entered into an express agreement of record, that the case be first tried and finally determined between the original parties to the suit, before proceeding against the warrantors.

The clerk certifies that the record contains all the evidence adduced on the trial, except certain documents which he describes as having been introduced in evidence by the defendant, "*but have never been filed in the case,*" etc. It was objected to, on the part of the defendant, that the record was incomplete. A *certiorari*, to complete the record, was then applied for and refused.

Lobdell, for the warrantors, moved to dismiss the appeal, because they had not been made parties and cited in the appeal, when they were made parties and appeared in the court below.

L. Janin, for the defendant, moved also to dismiss the appeal, on account of various imperfections in the record, and for want of the warrantors being cited in the appeal.

Preston, for the plaintiffs and appellants, argued to sustain the appeal, and showed that the imperfections in the record were occasioned by the defendant and warrantors, etc. He moved for further time to complete the record, and cite in the warrantors, etc.

Bullard, J., delivered the opinion of the court.

In this case we have considered the motion for a *certiorari*, to complete the record, and being of opinion that it would be

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January, 1839.

HUTCHISS,
TUTOR, ETC.
vs.
DODD ET AL.

doing a vain thing, inasmuch as it is not in the power of the clerk to supply the defect from documents in his office, the motion is overruled. If we were satisfied that the appellants had been without fault, and that they had been prevented by the acts of the other party from bringing up a complete record, we might think ourselves authorized to send the case back for a new trial.

A motion has also been made to dismiss the appeal, on the ground that the warrantors are not parties. We think the agreement in the record, that this case shall first be tried as between the original parties, takes it out of the general rule, and that it was not necessary to make the warrantors parties to the appeal. The motion to dismiss is overruled.

The case must, therefore, be set down for argument, on any bill of exceptions, or matters of law apparent on the face of the record, which the appellant may assign.

HUTCHISS, TUTOR, ETC. vs. DODD ET AL.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF WEST
BATON ROUGE.

The sale of an estate inherited by minor heirs, may be made below the price of the appraisement, in order to pay the debts of the ancestor.

But when *such* sale is not provoked by any creditor, and it is not shown to be necessary for the payment of debts, but that it was made principally to effect a partition, it is null and may be set aside.

This is an action instituted by the plaintiff as tutor of the minor children of James Hackett, deceased, to annul a sale of the property of his succession, on the ground that it was made below the appraised value.

He shows, that in pursuance of the advice of a family

meeting, and an order of the Court of Probates, the plantation and lands of the late James Hackett were appraised at the sum of eighteen thousand dollars, and offered for sale in two divisions or lots; and that the defendant, Dodd, purchased one of said lots, for eleven thousand one hundred and forty dollars, and F. Duplantier, the other, for four thousand eight hundred and ninety-five dollars, making an aggregate of sixteen thousand and thirty-five dollars, and falling short of the appraised value. He prays that said sale be annulled, and the property resold according to law.

The family meeting declared, "that in order to pay the debts, and for the best interests of the minors, the property should be sold, etc."

The land, consisting of a sugar plantation, fronting on the Mississippi river, was divided into divisions or lots, and put up at public sale, when the defendants became purchasers at less than the appraised value.

The plaintiff insisted, that the parish judge should proceed to a resale of the property according to law, which was refused. He then instituted the present suit, to set aside the first sale, as illegal and null.

The judge of probates decided these sales were good, and from judgment maintaining them, the plaintiff appealed.

Labauve, for the plaintiff and appellant.

Martin, J., delivered the opinion of the court.

The plaintiff complains of a judgment which sustains a sale of the land of the minors whose tutor he is, and which he sought to set aside, on the ground that it was illegally made below the price of the appraisement. The court sustained the sale, because it was made with the advice of a family meeting, for the purpose of paying the debts of the minors' ancestor, and to effect a partition.

It appears to us, the judge of probates was in error. It is true that when creditors sue for their debts, and procure a sale of the estate for their payment, the land may be sold as in other cases, although minors may be interested therein ;

EASTERN DIST.
January, 1839.

HUTCHINS,
TUTOR, ETC.
vs.
DODD, ET AL.

The sale of an estate inherited by minor heirs, may be made below the price of the appraisement, in order to pay the debts of the ancestor. But when such sale is not provoked by any

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HUTCHISS,
TUTOR, ETC.

OR.

DODD ET AL.
 creditor, and it is not shown to be necessary for the payment of debts, but that it was made principally to effect a partition, it is null and may be set aside.

because the minors, at best, have but a residuary interest in the estate, which can be ascertained only by a full administration. 8 *Louisiana Reports*, 412.

In the present case, the sale was not provoked by any creditor, and it does not appear from the record that the sale was necessary for the payment of debts, for which creditors were pressing, but principally for a partition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, and that the sale to the defendants, of the lands of the minors, be annulled and set aside, and that the property be resold according to law ; the defendants paying costs in both courts.

EASTERN DISTRICT—MARCH TERM, 1839.



MONDAY, MARCH 4th.—On this day, P. A. ROST and GEORGE EUSTIS, who were recently appointed Judges of this Court, appeared, and after having taken the oaths prescribed by law, took their seats on the bench; Judge MARTIN, the senior Judge, presiding. The commissions of the new Judges having been read in open Court, and it appearing that they bore date the same day, the Judges are required by law to sit by seniority of age; Judge ROST being the senior, took his seat on the right, and Judge EUSTIS on the left of the presiding Judge.

The Court at this date consists of

The Honorable FRANÇOIS XAVIER MARTIN,
 " " P. A. ROST,
 " " GEORGE EUSTIS.

ESCURIX *vs.* DABOVAL.

EASTERN DIST.
March, 1839.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE PARISH OF ST. JAMES, THE JUDGE OF THE FOURTH PRESIDING.

**ESCURIX
vs.
 DABOVAL.**

A judgment creditor is liable in damages, in an action for the false imprisonment of his debtor on a *ca. sa.*, if the writ issues *illegally*; but where no malice is shown, and the party might have been easily mistaken in taking out his writ, if considerable damages are given, the court will grant a new trial.

135	87
48	64
13	87
116	439

So, where the creditor, without malice shown, took out his *ca. sa.*, on advice of his counsel, and imprisoned his debtor for twenty days, and the jury gave three thousand dollars in damages for false imprisonment, the court ordered a new trial, and said, "had there been a plea of prescription on the part of the defendant, it would have been noticed, and without expressing an opinion as to its effect, suggest that it be filed before the next trial."

This is an action to recover damages for false imprisonment. The case was before this court in February, 1835,

EASTERN DIST. and remanded for a new trial. The facts of the case are
March, 1832. stated in the former trial in this court. See 7 *Louisiana*
Reports, 575.

ESCURIX
VS.
DABOVAL.

The present defendant having obtained a judgment against Escurix, the plaintiff in this suit, caused execution to issue thereon, in which a slave was seized and sold, and the proceeds of sale was enjoined in the sheriff's hands by the wife of the debtor. Escurix, the debtor, having gone from the parish of St. James, where the judgment was rendered, to Ascension, Daboval took out an execution directed to the sheriff of that parish, which was returned *nulla bona*. He then, on the advice of his counsel, caused a *ca. sa.* to issue, upon which Escurix was imprisoned about twenty days, and gave a bond for the prison limits. He afterwards, by his counsel, had the writ of *ca. sa.* quashed, on motion before the District Court in the parish of St. James, and set aside as having illegally issued. See 8 *Louisiana Reports*, 96.

Escurix then commenced his action against Daboval for false imprisonment, and claimed three thousand dollars in damages.

On the return of the cause from this court it was again submitted to a jury, on all the evidence and facts exhibited by the parties.

The judge charged the jury, that the whole question turned upon the legality or illegality of issuing the writ of *capias ad satisfaciendum*.

The defendant's counsel requested the judge to charge the jury, that "even if the issuing of the *ca. sa.* was considered illegal, yet the jury could only find such special damages as were proved, unless they were convinced the defendant was actuated by malice; and that the allowance of smart money, or vindictive damages, could only be found, when the jury were clearly convinced that the defendant was actuated by malice in imprisoning the plaintiff." This part of the charge was refused, and the defendant took his bill of exceptions to the refusal of the judge.

The jury returned a verdict of three thousand dollars in damages for the plaintiff. After an unsuccessful attempt to obtain a new trial, the defendant appealed.

J. Seghers, for the plaintiff, urged the affirmance of the judgment. EASTERN DIST.
March, 1839.

Isley and *Nichols*, for the defendant, insisted that the damages were excessive, and were wholly unsupported by the evidence and the nature of the case. Various other matters were urged in mitigation, and in defence of the action.

ESCURIX
VS.
BARBOVAL.

Eustis, J., delivered the opinion of the court.

This is an action of damages for false imprisonment. The plaintiff complains that he was arrested on the second day of October, 1832, under a writ of *capias ad satisfaciendum*, illegally issued by the defendant; that he was imprisoned for more than five weeks under said writ, and having given security for the prison limits, which are co-extensive with the parish of Ascension, that he was detained there for ten months, his place of residence being in the parish of St. James at the time; there are the usual charges of malice on the part of the defendant, in relation to this imprisonment and detention, and the injuries stated to have resulted therefrom, are alleged to have been of the most serious kind to himself and family.

A jury on a previous trial gave the plaintiff three thousand dollars damages; but in an appeal to this court, the judgment was reversed, and the cause remanded, in order to enable the defendant to avail himself of certain matters of defence of which he had been deprived in the court below.

On a second trial, a verdict for the same amount has been given; the court below refused the defendant a new trial, and gave judgment for the amount of the verdict; from this judgment the defendant has appealed.

When this cause was before this court at a previous term, the only matter for its consideration was the point before stated; no question was made or decided as to the amount of the damages.

The plaintiff was taken into custody on the 2d of October, 1832; he was detained until the 22d of that month, when he was released, on giving bonds to keep the limits assigned

EASTERN DIST.
March, 1839.

ESCURIX
vs.
DABOVAL.

A judgment creditor is liable in damages in an action for the false imprisonment of his debtor on a *ca. sa.*, if the writ issues *illegally*; where no malice is shown, and the party might have been easily mistaken in taking out his writ, if considerable damages are given, the court will grant a new trial.

So, where the creditor without malice shown, took out his *ca. sa.* on advice of his counsel, and imprisoned his debtor for twenty days, and the jury gave three thousand dollars in damages for false imprisonment, the court ordered a new trial and said, "had there been a plea of prescription on the part of the defendant, it would have been noticed, and without expressing an opinion as to its effect, suggest that it be filed before the next trial."

for debtors in such cases. Admitting that the writ was illegally issued, on the plaintiff executing his bond, he was at large, and under no restraint of which he can complain. If the writ was illegally issued, the bond taken out under it was void, and his remaining in the parish of Ascension afterwards was, with him, a matter of choice.

The writ was returned on the 2d of October, 1833, and certain proceedings were commenced on the 21st of October of that year, (a year less a day after he was released from custody,) in order to test its validity.

If the writ was illegally issued, the confinement during twenty days, in the month of October, 1833, was illegal, and as the defendant is bound to answer for the validity of the writ, he is liable to the plaintiff for damages. The amount of these damages is a question on which we have not been able to agree with the judge of the court below and the jury. We see nothing in the facts of this case but an attempt on the part of the defendant, a creditor, to obtain by process of law from his debtor, the plaintiff, the payment of a just debt, which the latter, up to this time, has been able to defeat. Nothing that we find in the whole evidence shows any malice on the part of the defendant. The writ was issued on the advice of his counsel, and although it has been determined that the writ was illegally issued, its illegality is very far from being clear and evident, and we consider it a subject about which a creditor may easily have been mistaken, and counsel may have well differed in opinion. Under this view of the case, we think the judge erred in refusing the new trial asked by the defendant. Had there been a plea of prescription on the part of the defendant, we should have noticed it, and without expressing any opinion as to its effect, we suggest that it be filed before the next trial of the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, the verdict set aside, and a new trial granted; and it is further ordered, that the case be remanded for further proceedings, according to law, the appellee paying the costs of the appeal.

LAPICE *vs.* SMITH.EASTERN DIST.
March, 1839.APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINT COUPEE, THE JUDGE THEREOF PRESIDING.

LAPICE
vs.
SMITH.

An informality in the citation, and an order of court requiring a new one, does not operate a discontinuance, so as to require payment of costs by the plaintiff before the suit proceeds.

A statute of another state, authenticated by the great seal and the certificate of the secretary of state, is admissible in evidence here.

An obligation executed here, and made payable in Mississippi, will be governed by the laws of that state, regulating the rate and payment of interest accruing after maturity.

This is an action by the payee against the maker of two promissory notes, made in the parish of Point Coupée, and payable at the Planters' Bank of the state of Mississippi, at Natchez, amounting in the aggregate to the sum of one thousand four hundred and thirty-one dollars. The plaintiff claims interest, at the rate of eight per cent. per annum, from the time said notes became due, until paid, which is allowed by the laws of the state of Mississippi, the place where they are made payable.

The defendant pleaded several exceptions to the informality of citation, etc.; and in his answer, admitted his signature to the notes, but denied the allegations generally.

On these pleadings and issues the cause was tried.

Several bills of exception were taken on the trial, which are noticed in the opinion of the court which follows, and need not be recapitulated.

There was judgment for the plaintiff, and the defendant appealed.

Patterson, for the plaintiff, urged the affirmance of the judgment with ten per cent. damages as for a frivolous appeal.

Stevens, for the defendant and appellant, insisted that his exceptions were improperly overruled, and cited in his support *Code of Practice*, article 492, 536.

EASTERN DIST.
March, 1839.

LAFICK
vs.
SMITH.

2. The statute of Mississippi, relating to the rate of interest, was improperly admitted in evidence. The notes did not draw interest, none being stipulated on their face; but the judgment gives interest, and in this respect it is erroneous.

Rost, J., delivered the opinion of the court.

The plaintiff sues upon two promissory notes, subscribed by the defendant, and made payable and negotiable at the Planters' Bank of Mississippi, at Natchez. He alleges that, at their maturity a demand of payment was duly made at the place stipulated, and that payment was refused; he prays judgment for the amount of the notes, with interest at eight per cent. per annum, since they became due. The defendant first excepted to the citation, on account of informalities, and his exception being sustained by the court, a new citation issued.

An informality in the citation and an order of court requiring a new one, does not operate a discontinuance so as to require payment of costs by the plaintiff before the suit proceeds.

A statute of another state authenticated by the great seal and the certificate of the secretary of state, is inadmissible in evidence here.

An obligation executed here and made payable in Mississippi, will be governed by the laws of that state, regulating the rate and payment of interest.

The defendant filed an answer, which we deem it unnecessary to notice, because the grounds of defence which it contains are entirely unsupported by evidence. During the trial, two bills of exception were taken by the defendant's counsel; one to the opinion of the court, that the suit might be proceeded in, although the costs incurred on the first citation had not been wholly paid; the other, to the admission in evidence, of a copy of a statute of the state of Mississippi under the great seal of the state, and the certificate of the secretary of state. There is nothing in either of these objections. An informality in the citation cannot be considered as a discontinuance, and the copy of the statute bearing upon its face the great seal of the state of Mississippi, and the certificate of the secretary of state, who is by law the keeper of that seal, required no other authentication. Judgment was given in favor of the plaintiff in the court below, and we are of opinion it ought to be affirmed. The obligations sued on being payable in the state of Mississippi, the rate of interest accruing after their maturity, must be regulated by the laws of that state. But as the defendant may have had doubts on the subject, on account of the notes hav-

ing been subscribed in Louisiana, we will not allow damages for a frivolous appeal, as prayed for by the plaintiff.

EASTERN DIST.
March, 1839.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

LE BRET
vs.
BELZONS.

LE BRET vs. BELZONS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF POINT COUPEE, THE JUDGE THEREOF PRESIDING.

The declarations of a witness on his *voir dire*, touching his interest and connection with one of the parties to the suit, are entitled to greater credit than his statements to a third person when not under oath.

If some parts of the evidence offered in a case is irrelevant, it affords no good ground to reject the whole. The objectionable parts only should be disregarded.

Irrelevant testimony will be disregarded in this court, but furnishes no ground for remanding a cause.

Bills of exception to the admissibility or rejection of evidence, should state the grounds on which the parties rely, in so clear a manner as to enable the court to comprehend them. Inadmissibility is perhaps too general an objection.

This is an action against the defendant, to recover the sum of four hundred dollars in damages, for failing and refusing to issue an execution, as clerk of the Parish Court of Pointe Coupée, on a judgment which the plaintiff alleges he had obtained in said court against one Devall, for two hundred and eighteen dollars, with interest and costs.

He alleges, that he several times demanded of the defendant, as clerk, to issue a *feri facias* on his said judgment, to the parish of West Feliciana, against the property of Devall,

EASTERN DIST.
March, 1839.

LE BERT
vs.
BELLONS.

situated therein, and that he constantly refused ; as also did his deputy, (Valery Ledoux) by reason of which he has lost his debt. He, therefore, prays judgment for four hundred dollars in damages, which he has sustained in consequence of the refusal of the defendant to issue said writ, as he was bound to do by law.

The defendant pleaded a general denial, and upon this issue the cause was tried by the court.

On the trial, several bills of exception were taken, in relation to evidence and witnesses offered by the parties. The substance of these exceptions are stated in the opinion of the court, and need not be recapitulated. The appellant relied on these exceptions for the reversal of the judgment.

The district judge gave judgment for the defendant, from which the plaintiff appealed.

Stevens, for the appellant.

L. Janin, contra.

Martin, J., delivered the opinion of the court.

The plaintiff seeks to recover from the defendant, clerk of the court of the fourth district, the amount of a judgment which he had obtained against one Devall, in that court, on the ground that he was disabled from having satisfaction thereof, through the great neglect and delay of the present defendant in issuing execution.

The general issue was pleaded ; there was judgment for the defendant, and the plaintiff appealed.

Our attention is first drawn to a bill of exceptions, taken by the plaintiff to the admission of Ledoux, a witness offered by the defendant, on the ground of interest. It being alleged that he was the defendant's deputy, and entitled to a portion of the fees, as a compensation for his services. The witness being examined on the *voir dire*, deposed, that he was compensated by a salary, and not by a portion of the fees. This was attempted to be disproved by the testimony of Mix, which was received without opposition. He deposed that he

The declaration of a witness on his *voir dire*, touching his interest and connection with one of the parties to the suit, are entitled to greater credit than his statements to a third person, when not under oath.

heard Ledoux say, within two months, that he had one half of the fees of said office as his compensation for the last year, as deputy clerk. EASTERN DIST.
March, 1839.

LE BRET
VS.
NELSON.

It does not appear to us the court erred. The plaintiff had called on Ledoux to *swear*, and the court correctly gave greater credit to what he *swore*, than to what he had said when not under oath.

Another bill of exceptions taken by the plaintiff, is to the admission of two documents or pieces of testimony, which were objected to, one on an allegation that it contradicted the sheriff's return; the other, on the score of irrelevancy. We have examined the testimony, and find that it contains a number of facts which have no relation to the sheriff's return; and if any of them had, it afforded no ground to reject the whole; and the objectionable part must be disregarded. Irrelevancy of documentary or testimonial proof, is a ground of objection, principally because it creates loss of time, and often confusion. Irrelevant matter is disregarded in this court, but affords no ground for remanding a cause.

The last bill is to the admission of the testimony of Janin, as irrelevant and inadmissible. Part of what has been just said applies to the objection on the score of irrelevancy. In bills of exception, the grounds on which the parties rely ought to be stated in so clear a manner, as to enable the court clearly to comprehend them. Inadmissibility is, perhaps, too general an objection. Be that as it may, as the case was not tried by a jury, the error of the inferior court, if any existed, could not require the remanding of the case, as the effect of it would be cured by disregarding the evidence.

On the merits, a thorough examination of the record and evidence, has not enabled us to discover that the plaintiff is entitled to relief at our hands.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.

STATE VS. GOSSIN ET AL.

March, 1839.

STATE

VS.

GOSSIN ET AL.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE
PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.

The execution of a bail bond, in a criminal case, need not be proved when it purports to have been signed and sealed in the presence of a witness, who certifies the transcript of appeal *as clerk of the court*, especially when the court has acted on it as a public record.

On a motion to enter up judgment on a bail bond, against the principal and his sureties, it is sufficient to assign as reasons for the judgment, that "the appearance bond of the accused was called, and he failed to appear in compliance with his recognizance."

This case comes up on an appeal from a judgment rendered on motion of the district attorney, against the principal and his sureties, in a bail bond for his appearance at the next term of the court, to answer a charge made against him, of having committed an assault and battery.

At the term of the court to which the principal was recognized to appear, the following order and judgment was entered up.

On motion of John J. Mortee, Esq., district attorney, leave having been first had and obtained from the court, and the appearance bond of the accused having been called out agreeably to law, and the said Gossin having failed to appear in compliance with his recognizance, it is, therefore, ordered, etc., that the said William E. Gossin, and his sureties, be condemned *in solido*, to pay the state of Louisiana the sum of five hundred dollars, the amount for which they were severally bound, for the appearance of said Gossin, etc.

J. Arthur, one of the sureties alone appealed.

Pem, for the appellant.

Mortee, district attorney, contra.

Rost, J., delivered the opinion of the court.

William E. Gossin, being charged with having committed an assault and battery, gave a bond in the usual form, with

Jonathan Arthur and others as securities, to be and appear at the next term of the District Court, to be held in and for the parish of St. Tammany, to answer said offence. The accused did not appear at the appointed time, and on motion of the district attorney, leave having first been obtained from the court, he was called out on his recognizance, and failing to answer, judgment was entered *in solido*, against him and his securities, for the amount of the bond.

A motion for a new trial was made on behalf of the defendants, and overruled by the court. Jonathan Arthur, one of the securities, appeals, and asks a reversal of the judgment on the following grounds:

1st. That there is no evidence in the record to prove the execution of the bond.

2nd. That the judgment of the District Court is given without assigning reasons.

I. The bond appears on the face of it, to have been signed and sealed in the presence of E. P. Ellis, who certifies the transcript of appeal, as clerk of the court; and it is moreover recognized and acted upon, as a public record by the court to which it belongs; that court knows its officers, and the acts passed before them, in the due course of their ministerial functions, need not be proved.

II. The reasons assigned in the judgment are, "that the appearance bond of the accused having been called out, agreeably to law, he had failed to appear in compliance with his recognizance." We are not aware that better or other reasons could have been assigned.

EASTERN DIST.
March, 1839.

STATE
VS.
GORMIN ET AL.

The execution of a bail bond, in a criminal case, need not be proved, when it purports to have been signed and sealed in the presence of a witness, and who certifies the transcript of appeal as clerk of the court, especially when the court has acted on it as a public record.

On a motion to enter up judgment on a bail bond, against the principal and his sureties, it is sufficient to assign as reasons for the judgment, that "the appearance bond of the accused was called, and he failed to appear in compliance with his recognizance."

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.

March, 1839.

POYDRAS vs. DELAMARE ET AL.

POYDRAS

vs.

DELAMARE ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF POINT COUPÉE, THE JUDGE OF THE SECOND PRESIDING.

Parol evidence will not be admitted, to show the *usual* rate of interest in a particular place in this state. The rate of conventional interest must be fixed in writing.

Where the principal, residing in France, draws on her agent in this state, to pay over a certain sum of money to a third person, with the usual interest, it amounts to nothing more on her part, than a promise to pay the amount with interest, on the presentation of the order at the place it is made payable.

On the refusal of the agent to pay the order of his principal, the latter is alone bound, and is not entitled to notice on such refusal.

The agent having funds of his principal in his hands, and refusing to pay them over to the payee of his principal, is not individually bound. The neglect of the agent to obey the directions of his principal, does not render him liable to a third person.

Where an order is drawn on a general or particular fund for part only, it does not amount to an assignment of that part, unless the drawee consents to the appropriation by the acceptance of the draft.

Benjamin Poydras de Lalande, the plaintiff in this case, alleges, that Madame Bonneau, separated from bed and board, from her husband, and residing at Nantz, in the kingdom of France, but represented in this state by Gustave Delamare, residing in the parish of Pointe Coupée, her attorney in fact, are indebted to her *in solido*, in the sum of two thousand one hundred and eight dollars and twenty-four cents, with ten per cent. interest thereon, for this, to wit: That on the 1st September, 1835, Madame Bonneau, at Nantz, drew a bill of exchange, to the order of this petitioner, on her agent, Delamare, requiring him to pay on demand the said sum, it being for the amount of two obligations, for eight hundred dollars each, which she owed this petitioner, and an account of five hundred and eight dollars, which he rendered the 1st September, 1835; and that she required her said agent or attorney in fact, to pay interest on said sums as had

been agreed on at various times, at the rate of ten per cent., the customary interest in the parish of Pointe Coupée, where the bill and all of said obligations were to be paid.

EASTERN DIST.
March, 1859.

FOYDRAS
VS.
DELAMARE ET AL

The plaintiff further shows, that said bill was payable at sight, and that when presented for payment, Delamare refused to pay the same according to the tenor thereof, and it was duly protested for non-payment; that Delamare had funds of Madame Bonneau in his hands, and was apprised, and knew for some time before the bill was presented for payment, that the plaintiff was the payee and holder thereof, but he refused, and still doth refuse to pay said bill. Wherefore he prays judgment *in solido* against said defendants, for the amount of said draft or order, with ten per cent. interest on the several sums composing it, from the time when they respectively became due.

Certain interrogatories were propounded to Delamare relative to his agency, the 'accounts and the funds of Madame Bonneau in his hands at the time of presenting the draft.

The defendant, Delamare, admitted the signature of Madame Bonneau to the draft sued on, but pleaded a general denial; and also excepted to answering certain of the interrogatories propounded.

On motion of the defendant's counsel, the interrogatories relating to the usual rate of interest, in this case, was struck out, and he having failed to answer the remaining ones, they were taken for confessed.

The cause was submitted to the court on the evidence adduced by the parties.

The district judge rendered judgment for the amount of the draft, with legal interest on two of the items composing the draft, and ten per cent. on the other against both defendants.

Delamare for himself, and as agent of Madame Bonneau, after an unsuccessful attempt to obtain a new trial, appealed.

L. Janin, for the plaintiff, contended that the interrogatories propounded, and the testimony offered to show in what sense

EASTERN DIST. the defendant, Madame Bonneau, had used the words "*les intérêts d'usage*," in her written obligations of the 7th July, 1828, and 9th November, 1829, which the order or bill of exchange was drawn to cover, should have been allowed.

FOYDEAS
VS.
DELAMARE ET AL.

2. The plaintiff contends, that Madame Bonneau understood by these words conventional interest, at the rate of ten per cent. per annum, which she was always in the habit of paying on loans of money in Louisiana. This was the usual interest taken in Pointe Coupée, where her property was situated, and where the draft was made payable; and this is what she meant in using the words *les intérêts d'usage*.

3. The words "*les intérêts d'usage*" contain a latent ambiguity, as used in this case, and parole evidence should be admitted to explain it. 3 *Starkie*, 1021.

A. N. and R. N. Ogden, insisted upon the nullity of the obligations given by Madame Bonneau before she went to France, and while she was a married woman in Pointe Coupée. These were entered into without any authorization from her husband, or that of a competent tribunal, and are therefore null and void. The draft sued on was given to take them up, and if she was not bound to pay them, she cannot be held liable for this.

Eustis, J., delivered the opinion of the court.

The defendant, Madame Bonneau, on the 1st September, 1835, at Nantz, in the kingdom of France, drew an order in favor of the plaintiff or his order, on the defendant, Gustave Delamare, her attorney in fact in Pointe Coupée, requesting him to pay on demand the sum of two thousand one hundred and eight dollars and twenty-four cents, being the amount of two certain obligations, and of the balance of a settled account, which she owed the plaintiff. The order was presented to the defendant, Delamare, who refused to pay it: it was protested, but no notice was ever given to Madame Bonneau.

Parole evidence will not be admitted to show the usual rate of interest in a particular place in this state. The rate of conventional interest must be fixed in writing.

In the two obligations which were executed at Nantz, there is a stipulation on the part of Madame Bonneau, that

she should pay *les intérêts d'usage*. In the account, the balance of which formed the residue of the amount of the order, ten per cent. is the interest allowed by the parties. In the order, Delamare is directed to pay the amount mentioned *avec les intérêts stipulés aux dites obligations*.

We agree with the judge below in his opinion, which excluded parole evidence of the usual rate of interest at Pointe Coupée. The rate of conventional interest must be fixed in writing, and testimonial proof of it is not admitted in any case. *Louisiana Code*, 2895. The amount given by the judgment to the plaintiff, principal and interest, is correct.

The order given in France by Madame Bonneau to her agent, amounted to nothing more than a promise on her part to pay the amount with interest, at the presentation of the order in Pointe Coupée. She was not entitled to notice on the refusal of her agent to pay, which was in point of fact, a default on her part.

Although Delamare had funds of Madame Bonneau in his hands, at the time of the presentation of the order, and refused to pay it, we do not think the plaintiff on the evidence can maintain his action against Delamare. The order was to him, as her attorney in fact; it is so stated in the petition, and we do not think that by his neglect to obey the directions of his principal, that he has rendered himself liable in this action to the plaintiff. If the order be considered in the light of an assignment of that amount of money, in the hands of a third person, we should not be able to enforce it against the defendant, Delamare, at the instance of the plaintiff. It is well settled, that where an order is drawn on a general or particular fund, for a part only, it does not amount to an assignment of that part, unless the drawee consents to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract. *Mandeville vs. Welch*, 5 *Wheaton*, 277.

There is nothing in the evidence, or in the relations of these parties, which will render Delamare liable under the operation of this principle. The judgment of the District

EASTERN DIST.
March, 1839.

FOYDRAS
vs.

DELAMARE ET AL.
Where the principal, residing in France, draws on her agent in this state, to pay over a certain sum of money to a third person, with the usual interest, it amounts to nothing more than a promise to pay the amount with interest, on the presentation of the order at the place it is made payable.

On the refusal of the agent to pay the order of his principal, the latter is alone bound, and is not entitled to notice, on such refusal.

The agent having funds of his principal in his hands, and refusing to pay them over to the payee of his principal, is not individually bound.

The neglect of the agent to obey the directions of his principal, does not render him liable to a third person.

Where an order is drawn on a general or particular fund for part only, it does not amount to an assignment of that part, unless the drawee consents to the appropriation by the acceptance of the draft.

EASTERN DIST. Court is reversed, so far as it relates to Delamare, and
March, 1839. affirmed as to the defendant, Madame Bonneau : the appellee
 JENKINS' HEIRS to pay the costs of the appeal.
 vs.
 JENKINS' CUR'TR

JENKINS' HEIRS vs. JENKINS' CURATOR.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
 NEW-ORLEANS.

In an action by the heirs of a deceased brother against the succession of the other, for wages as clerk of the latter, when the evidence preponderates to show he was a partner of his deceased brother, he will be so considered, and a recovery of wages, as clerk, under these circumstances, refused.

This is an action by the attorney of the absent heirs of Francis W. Jenkins, against the curator of the succession of George G. Jenkins, also a deceased brother, to recover the sum of two thousand five hundred dollars, for wages as a clerk and mercantile agent of the house of George G. Jenkins, from the 18th June, 1836, to the 18th September, 1837, which services are alleged to be worth two thousand dollars per annum.

The curator refused to admit the claim, and pleaded a general denial ; he also pleaded a small demand in compensation of any sum which might be allowed the plaintiffs.

In the trial of the cause, the plaintiffs' demand was resisted mainly on the ground that F. W. Jenkins and George G. Jenkins were partners, under the name and firm of G. G. Jenkins & Co.

The judge of probates states that the plaintiffs' evidence went to raise the presumption that the partnership did not exist, but that this presumption is destroyed by the plaintiffs' ancestor signing the commercial signature of the firm as a

member thereof. There was judgment for the defendant, and the plaintiffs appealed.

EASTERN DIST.
March, 1839.

Hoffman, for the appellants.

JENKINS' HEIRS
vs.
JENKINS' CUR'TR

Maybin, contra.

Eustis, J., delivered the opinion of the court.

The plaintiff alleges, that the succession of George G. Jenkins is indebted to the heirs of Francis W. Jenkins, in the sum of two thousand five hundred dollars for services as chief clerk and mercantile agent, rendered to the deceased G. G. Jenkins, from the 18th June, 1836, to the 18th September, 1837, during the greater part of which time the former was in the entire charge of the mercantile business of the latter, who was then absent.

The plea was the general issue, and compensation for the sum of four hundred and ninety-three dollars twenty-six cents. There was judgment in the court below for the defendant, and the plaintiff appealed.

The opinion of the judge of the Court of Probates was, that the deceased brothers were partners; the correctness of this opinion depends on a few facts, the consideration of which, induces us to acquiesce in it.

This mercantile business was transacted under the name of G. G. Jenkins & Co. Who the company was, does not appear; this important point of the case is left unexplained. Francis W. Jenkins, it is proved, endorsed a note in the name of the firm, and with his knowledge, as we think from the evidence, a suit was brought by the two brothers, as composing the firm of G. G. Jenkins & Co. Francis W. Jenkins had a power of attorney authorizing him to sign the name of his brother, but he had no authority to sign the name of the firm. His use of the name of the firm, we think, outweighs the evidence on the other side, which is entirely of a negative character. However the matter may stand between the parties, as the curator represents the creditors as well as the heirs of the deceased,

In an action by the heirs of a deceased brother against the succession of the other, for wages as clerk of the latter, when the evidence preponderates to show he was a partner of the deceased brother, he will be so considered, and a recovery of wages as clerk under these circumstances, refused.

EASTERN DIST. and as we think the deceased Francis W. Jenkins in relation
March, 1839. to creditors was a partner of the firm of G. G. Jenkins & Co.,
GONZALES ET AL. we affirm the judgment of the court below, with costs in both
vs. courts.
GONZALES.

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GONZALES ET AL. vs. GONZALES.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ASSUMPTION.

A will, dictated in Spanish, the native tongue of the testator, and a memorandum thereof taken down in the French language by the notary, which is read to the testator, and approved by him, as expressing his intentions, and drawn up in the English language, of which the testator is ignorant, but signed by him, the notary and witnesses, *is null*, under the 1571st article of the Louisiana Code, which requires that a will should be written by the notary *as dictated*.

This is an action by the heirs at law of Joseph de Leon, *alias* Rodriguez, against Juan Gonzales, his instituted heir and testamentary executor, in which they allege that the last will and testament of the deceased, under which the defendant claims, is null and void, because it was not written as dictated by the testator. They pray that it be cancelled and annulled, that an inventory and appraisement be made of the property and effects of the deceased, and that he be declared intestate, and his estate go to his legal heirs.

The defendant pleaded a general denial, and avers the will under which he claims and administers the succession of the testator to be good and valid.

The cause was tried before the judge of probates on these pleadings and issues.

It appeared in evidence that the testator was a Spaniard, and did not understand the English language. The will is in the nuncupative form, by public act. The parish judge,

who, in his capacity of notary public, drew up the will, understood no Spanish. But the testator dictated his intentions and dispositions in Spanish to Manuel Fernandez, one of the witnesses, who translated it into the French language. This translation was read by the parish judge to the testator and witnesses, in the French language, which they all understood, and the testator said it was good, and expressed his intentions. The will was then drawn up in the form of a nuncupative testament, by authentic act, in the English language, which the testator and witnesses did not understand. Two of the witnesses were ignorant of the Spanish language, but understood the French; none of them understood any English. Before they signed, it was read by the parish judge to them and the testator, in the French language, with which they were all acquainted, and they signed.

EASTERN DIST.
March, 1839.

GONZALES ET AL.
VS.
GONZALES.

The parish judge who acted as notary on the occasion of making the will, was also judge of the Court of Probates before which this cause was tried. The judge pronounced the will good and valid, and dismissed the suit. The plaintiffs appealed.

Isley and Nichols, for the plaintiffs and appellants, contended that the will must be written out by the notary as dictated by the testator, which was not done in the case under consideration, but that it was written out from a memorandum, and drawn up in a language of which the testator was entirely ignorant. The law imposes the pain of nullity on the neglect of this formality. *Louisiana Code*, article 1571, 1588.

Testaments, or wills, deriving their force and effect from the provisions of positive law, must strictly and literally follow its requisitions. Every formality is sacramental, and must be rigidly complied with as the condition of its validity. *Knight vs. Smith*, 3 *Martin*, 156.

J. J. Roman, for the defendant.

Eustis, J., delivered the opinion of the court.

This is an action brought by the heirs at law of the

EASTERN DIST.
March, 1839.

GONZALES ET AL.
vs.
GONZALES.

A will, dictated in Spanish, the native tongue of the testator, and a memorandum thereof taken down in the French language by the notary, which is read to the testator and approved by him, as expressing his intentions, and drawn up in the English language of which the testator is ignorant, but signed by him, the notary and witnesses, is null, under the 1571st article of the Louisiana Code, which requires that a will should be written by the notary as dictated.

deceased, Joseph de Leon, *alias* Rodriguez, against the defendant, his testamentary heir, for the purpose of setting aside and annulling the will of the deceased.

The will was made on the 31st of July, 1835. The principal objection to its validity, and the only one we are called upon to notice, is that it was written in the English language, of which the testator was absolutely ignorant. It appears that Spanish was his native language, that he understood French, but did not understand English, the language in which the instrument signed by him as his will was written; that he dictated the contents of the will in Spanish, and the notary who wrote the will made a translation in writing, in the French language, of what had been dictated, which he read to the testator, who approved it as expressing his intentions. The instrument was then written in the English language, and signed by the testator, the notary and witnesses, after the requisite formalities.

Conceding that the will is valid in every other respect, we consider that the objection taken by the heirs at law is fatal.

The article 1571, of the Louisiana Code, requires that the testament should be dictated by the testator, and written by the notary as dictated. The instrument under consideration has passed through the process of a double translation, and cannot, in the sense of the code, be said to have been written as dictated by the testator.

We have been referred to the French authorities on this subject, and we are aware that, under the decisions of the court of cassation, a will would not be set aside for a cause like this in France, provided it was written in the French language. *Sirey*, 7, 1, 224; *idem*, 7, 2, 19.

But by the laws of France, notarial acts are required to be in the French language, and in cases in which the notary and witnesses do not understand the language of the testator, a sworn interpreter may be called in order to translate it. *Vide Dictionnaire du Notariat, Verbis Interprete et Langue des Actes.*

There is nothing in the laws which prevented the notary writing the will in this case as it was dictated by the testa-

tor. A notarial act of this kind in the Spanish language is valid. EASTERN DIST.
March, 1859.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be reversed; that the will of Joseph de Leon, *alias* Rodriguez, be annulled and set aside; that the case be remanded for further proceedings according to the prayer of the petitioners; and that the defendant pay costs in both courts.

HOSEA'S WIDOW
AND HEIRS
vs.
MILES.

HOSEA'S WIDOW AND HEIRS vs. MILES.

131 107
49 836

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINT COUPEE, THE JUDGE THEREOF PRESIDING.

An exception putting at issue the capacity of the plaintiff to sue, is a matter of fact which may properly be submitted to a jury with the other matters of defence, on the merits; the whole being peremptory exceptions.

The facts on which a continuance is asked should be established by affidavit.

Heirship may be established by parole evidence.

A verdict "*for the plaintiff*," without stating for what amount or object, is incorrect, and should be set aside, and a new trial granted.

A verdict and judgment which are deficient in the forms required by law, will be annulled and set aside; but when this court is in possession of all the facts and evidence necessary to pronounce definitively in a case, it will render such judgment as should have been given in the court below, on the merits.

This is an action by the widow and heirs of Thomas N. Hosea, deceased, on a promissory note for five hundred dollars, executed by the defendant, and made payable to the order of the deceased, at the office of discount and deposit of the Bank of Louisiana, in St. Francisville, in all the month of March, 1838. The plaintiffs pray judgment for the amount of the note, etc.

EASTERN DIST.
March, 1839.

**HOSEA'S WIDOW
AND HEIRS
vs.
MILES.**

The defendant excepted to the plaintiffs' action, and denied that Mrs. Hosea was the widow and in community with the late Thomas N. Hosea, the payee of the note sued on, or that she was tutrix of his children, and that they were not his heirs, and not entitled to sue in this case. He then pleaded a general denial, and prayed that the suit be dismissed. There was also a plea of failure of consideration.

Upon these pleadings and issues the cause was submitted to a jury, on the evidence produced by the parties, who returned a verdict as follows: "Verdict in favor of plaintiffs." Upon this, the following judgment was pronounced: "By reason of the verdict of a jury first had, and the law and evidence being in favor of the plaintiffs; it is, therefore, ordered, etc., that they recover the sum of five hundred dollars, etc."

After an unsuccessful attempt to obtain a new trial, the defendants appealed.

Patterson, for the plaintiffs, prayed that the judgment be affirmed, with ten per cent. damages, and costs.

Stevens, for the defendants and appellants, urged various objections to the form of the verdict and judgment, and to the insufficiency of the evidence offered by the plaintiffs in support of their capacity to sue, and the validity of their demand.

Martin, J., delivered the opinion of the court.

The defendant complains of the judgment on the following grounds:

1. The court cumulated the exceptions with the merits, and ordered them to be tried together.
2. A continuance was improperly refused.
3. Parole evidence of heirship was improperly received.
4. It did not establish the heirship.
5. The verdict is illegal, null and void.
6. The judgment is illegal, there being no evidence of the costs of protest.

I. On the first point, we are referred to the Code of Practice, article 344, which does not appear to relate to the subject. The defendant was sued on a note, which he had given to the late husband and father of the present plaintiffs. The exception was, that the plaintiffs were not the widow and heirs of the payee of the note. The general issue was also pleaded. The capacity of the plaintiffs, as widow and heirs, was a matter of fact, which was properly submitted to the jury, with the other part of the defence; the whole being peremptory exceptions.

II. The record does not show that the facts on which the continuance was asked were established by an affidavit.

III. Children can seldom establish the relation in which they stand to their parents, otherwise than by parole.

IV. The testimony clearly establishes the heirship.

V. The verdict is in the following words: "*Verdict in favor of plaintiffs.*" The Code of Practice says, the form of a general verdict consists in the foreman endorsing on the back of the petition these words, "Verdict for the plaintiff, for so much." *Article 552.*

The verdict was, in our opinion, incorrect, and the judge erred in refusing the new trial which was asked on that ground.

VI. The judgment is illegal, because it contains none of the reasons on which it is grounded; and the costs of the protest and notices are not supported by evidence. It must, therefore, be annulled and reversed.

The Code of Practice, article 905, provides, that when the Supreme Court reverses the judgment of an inferior court, it shall pronounce on the case the judgment which the lower court should have rendered, if it be in possession of all the facts and testimony to enable it to pronounce definitively. In the present case, the evidence shows that the plaintiffs are the widow and heirs of defendants creditor, and that the note sued on is that of the defendant. This the jury have found. For a verdict for the plaintiff, if it establish any thing, establishes that the jury find that the facts, on which the plaintiff claims, are proved, and the verdict is deficient

EASTERN DIST.
March, 1839.

HOSEA'S WIDOW
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VS.
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An exception putting at issue the capacity of the plaintiffs to sue, is a matter of fact which may properly be submitted to a jury with the other matters of defence on the merits, the whole being peremptory exceptions.

The facts on which a continuance is asked, should be established by affidavit.

Heirship may be established by parole evidence.

A verdict "*for the plaintiff*," without stating for what amount or object, is incorrect, and should be set aside, and a new trial granted.

A verdict and judgment which are deficient in the forms required by law, will be annulled and set aside; but when this court is in possession of all the facts and evidence necessary to pronounce definitely in a case, it will render such judgment as should have been given in the court below on the merits.

EASTERN DIST. only in specifying the sum which the plaintiff is to recover.
March, 1839. We are, therefore, in possession of all the facts necessary to pronounce definitively.

**MOSKA'S WIDOW
 AND HEIRS
 VS.
 MILES.**

It may, however, be contended, that as the law authorizes parties to require a trial by jury, when this is done and we are dissatisfied with their verdict, it becomes our duty to remand the case. As this court possesses the right, and is under the obligation of examining questions of fact, as well as those of law, and as it is not provided with a jury, it follows, that it may become its duty to pronounce on a question of fact, in direct opposition to the verdict of the jury; otherwise, there might be cases in which suitors could not be relieved in this court, from erroneous decisions below. No doubt was ever entertained that this court can correct the errors of inferior judges on matters of fact. "It is always with reluctance that we interfere with the verdict of the jury; but it is entitled to our regard in questions of fact only." 11 *Louisiana Reports*, 303, *Livaudais vs. Perret et al.* In such cases, we are bound to regard, but not to adopt the verdict, so as to make it the basis of our judgment. In cases in which doubt exists in our minds, we remand a case for the opinion of another jury; but if our doubts of the correctness of the verdict be very slight, we adopt it as the basis of our judgment, although our opinion differs from that of the jury. In the construction of the article of the code now under consideration, we held, in the cases of *Segond vs. Thomas*, 10 *Louisiana Reports*, 299, *Tippet vs. Jett*, 362, and *Hanse et al. vs. New-Orleans Marine and Fire Insurance Company*, 13, that when the sum found by the verdict is too large, or otherwise incorrect, the error of the jury is to be corrected by this court, without remanding the case.

Wherefore, it is further ordered, adjudged and decreed, that the plaintiffs recover from the defendant the amount of the note sued upon, to wit: the sum of five hundred dollars, with interest at five per cent. from the date of the protest, to wit, the 3d of April, 1838, and three dollars costs of protest; the capacity of the plaintiffs to sue, and the execution and

protest of the note being duly proved. The costs of suit in the court below to be paid by the defendant; the plaintiffs and appellees paying the costs of the appeal.

EASTERN DIST.
March, 1839.

SICARD
VS.
CHITZ ET AL.

SICARD vs. CHITZ ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF POINTE COUPEE, THE JUDGE THEREOF PRESIDING.

The construction of dikes and levees, and removal of obstructions in the beds of rivers and navigable streams, are under the exclusive jurisdiction of the police jury in the parish through which these streams run.

So, where the defendants, by order of the police jury of Pointe Coupée, cut away a dam, and removed the obstructions in the bed, and which had been made across False River, by the plaintiff: *Held*, that they were not liable in an action for damages at the suit of the plaintiff.

The plaintiff alleges, that in the year 1838, the defendants, L. Chitz, C. Porche, and P. Jeoffrian, illegally, and without authority, entered upon his land, at the mouth of the upper canal of *Fausse Rivière*, and there cut away a dike, or dam, which he had constructed across said canal, for his own use and benefit, and which was situated on his own land. That by reason of said illegal acts, he has suffered damages to the amount of five thousand dollars, for which he prays judgment.

The defendants pleaded a general denial to the allegations not specially admitted. They aver that the plaintiff had built a dam across the principal pass of the upper channel of *Fausse Rivière*, thereby preventing the entrance of the waters of the Mississippi into this river, which was the only pass or natural water course running through a large settlement.

13L	111
44	616
13L	111
51	584
18	116
110	674
6110	675

EASTERN DIST.
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SICARD
vs.
CHITZ ET AL.

That the plaintiff had stopped up this pass, without any authority, and contrary to law, to the great injury of the inhabitants of *Fausse Rivière* and its numerous bayous, etc. They further aver, that they acted as a committee of the police jury, and under its orders, in cutting away the plaintiff's dam, and clearing the obstructions in the bed of the river. They pray that the police jury may be called in to defend this suit, and that it be dismissed, with costs.

Upon these pleadings and issues, the cause was tried before the court and a jury.

There were several bills of exception taken to opinions of the court, on contested points which arose on the trial, which are not deemed necessary to notice. The jury, after hearing all the evidence, returned a verdict for the defendants; and after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

Hiriart, for the plaintiff and appellant.

L. Janin, for the defendants, after explaining and commenting on the evidence of the case, contended—

1. That the channel closed by the plaintiff is a "common highway," which has to remain forever free. See 4th section of the act of congress, of April 30, 1812, entitled "An act for the admission of the state of Louisiana into the Union, etc." 1 *Moreau's Digest*, 224. A temporary obstruction does not destroy the character of a "common highway," which this water course had.

2. That even if this channel had not been a "common highway," the plaintiff could not have closed it. *Louisiana Code*, article 657.

3. That the police jury acted in the proper exercise of its authority, by ordering the destruction of the dam. 2 *Moreau's Digest*, 241.

4. That this dam was a public nuisance of a highly dangerous character.

Rost, J., delivered the opinion of the court.

The plaintiff seeks to recover damages from the defendants, EASTERN DIST. March, 1839. for breaking down, illegally, as he alleges, a dam, causeway, or dike, constructed by him across the mouth of the upper channel of False River.

SICARD
VS.
CHITZ ET AL.

The defendants deny their liability, and aver, that the plaintiff had erected a dam across the principal pass of the upper channel of False River, which is a navigable stream, and a natural water course, thus preventing all water communication between False River and the Mississippi, and depriving the planters on False River of the water necessary to their various purposes; that a petition praying for the abatement of that nuisance was signed by a large number of planters, and presented to the police jury, and that the defendants abated the nuisance by order of the police jury, and in conformity with an ordinance passed to that effect.

Judgment was given in favor of the defendants in the District Court, and a new trial having been asked, and refused, the plaintiff appealed.

In the course of the trial several bills of exception were taken, which the opinion we have formed does not make it necessary to notice.

The act further defining the organization, authority and functions of the police juries, approved the 25th March, 1813, authorizes them to make all such regulations as they may deem expedient:

For the making and repairing of causeways, dikes, and sewers.

For the clearing of banks of rivers and navigable streams, for the purpose of securing a free passage for boats and other small crafts. They are likewise empowered to cause to be opened again, such ancient natural drains as have been obstructed by the owners of the adjacent lands, and to prescribe the mode to be observed in that respect. 2 *Moreau's Digest*, 241, 242.

It is difficult to conceive a case that would come more clearly within the legitimate exercise of those powers than that which has given rise to the present suit. The plaintiff had not merely obstructed the banks of the river; he had

EASTERN DIST.
March, 1839.

SICARD
VS.
CHITZ ET AL.

stopped the river itself, and that river a branch of the Mississippi, and the only water communication between that stream and one of the oldest and largest settlements in the state.

The plaintiff has alleged, that the work complained of was erected on his own land, and could not be destroyed without his consent; but he shows no title, and the witnesses only say that the water course over which the dike was constructed runs through his land; the evidence of the same witnesses shows, that this water course and the other pass of False River, were at one time the only channel of the Mississippi; that the other pass is and has long been entirely obstructed by a raft, and that the pass upon which the dike was constructed is at the present time the only water communication between the Mississippi, False River, and the several streams which receive their waters from False River. We have no doubt, from the testimony, that this pass has in a great measure been filled up by the deposits of the Mississippi, but it is conclusively shown that it is not yet susceptible of private ownership. The construction of dikes upon it, and the removal of obstructions in its bed or on its shores, are, therefore, under the exclusive jurisdiction of the police jury, and judging from the course pursued by them in this instance, power could not be placed in safer hands. The solemn and guarded manner in which they proceeded in the exercise of an undoubted right, is worthy of all commendation. Upon receiving the petition of the inhabitants of False River, they appoint a committee of their own body, to examine the premises and report. A report favorable to the petitioners' demand being made, they resolve that the nuisance shall be abated, and pass an ordinance accordingly. They add another member to the committee already named; they take care to provide that two shall form a quorum, and they order the committee to go and clear the stream of all obstructions, if the plaintiff, on their request to that effect, refuses to do it himself. The plaintiff refuses, and the deed is done. We are of opinion that it was lawfully done, and that the plaintiff ought to take nothing by this action.

The construction of dikes and levees, and removal of obstructions in the beds of rivers and navigable streams, are under the exclusive jurisdiction of the police jury in the parish through which these streams run.

So, where the defendants by order of the police jury of Pointe Coupée, cut away a dam, and removed the obstructions in the bed, and which had been made across False River, by the plaintiff: *Held*, that they were not liable in an action for damages at the suit of the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.
March, 1839.

THOMPSON
VS.
SCHLATER.

THOMPSON VS. SCHLATER.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE PARISH OF IBERVILLE, THE JUDGE OF THE DISTRICT PRESIDING.

The act of congress passed the 15th of June, 1832, giving to front proprietors on water courses the preference of entering their back lands, provides that notices of such pre-emption claims shall be entered, and the money paid thereon, at least three weeks before the public sale of the lands in the township, by the proclamation of the President; and all lands not so entered shall be liable to be sold, or afterwards entered as other public lands. The act of the 24th of February, 1835, revives this act for one year.

So, where A enters back lands on the 18th of December, 1833, after the township had been offered at public sale by the President; and B, who owns the front tract, enters the same land as a back concession in 1836, under the pre-emption law of 1835: *Held*, that the entry and purchase of A, divested the government of its title, and B lost his right of pre-emption, which ceased to exist after the land had been offered at public sale.

The right acquired by a purchaser of public lands, according to the provisions of the pre-emption act of 1832, are vested, and cannot be taken from him by a subsequent act in 1835, reviving the former law for one year.

The plaintiff alleges he is owner of a front tract of land on the Mississippi, having seventeen arpents front with the usual depth; and that he entered his back lands in rear of his front tract, on the 14th of June, 1836, under the provisions of the pre-emption act of 1832, and revived by the act of 1835. That the defendant claims title to one hundred

EASTERN DIST.
March, 1839.

THOMPSON
vs.
SCHLATER.

and seventy-two superficial acres of his back lands, and persists in taking and holding possession thereof, and of cutting down timber and committing waste on the same, to his damage six thousand dollars. He prays judgment for his damages, and that he be decreed to be the owner of said land.

The defendant pleaded several exceptions and various matters in defence, not necessary to notice; finally, he called in his warrantor, who likewise cited his, until they came to one George Sharp, who purchased the disputed premises, together with other lands, by regular entry and purchase from the government of the United States, the 18th of December, 1833.

The evidence also showed this land, although it made part of back lands and might have been entered and purchased as a back concession under the pre-emption law of 1832, was not in fact so entered; but that it had been regularly offered at public sale, with the other public lands situated in the same township, by the President of the United States, and remained unsold, until purchased by George Sharp, under whom the defendant and his warrantors claim.

On the evidence and laws of congress produced, the district judge decided in favor of the defendant. The plaintiff appealed.

Labauve and Edwards, for the plaintiff and appellant.

A. N. Ogden and Robertson, for the defendant and warrantors.

Rost, J., delivered the opinion of the court.

This is an action for slander of title. The plaintiff alleges that he is the owner and proprietor of a tract of land fronting on the Mississippi River, having seventeen arpents front, with the depth thereto belonging, and also of one other tract of land, adjoining to and back of the former, which he acquired by purchase from the government of the United

States, on the fourteenth day of June, 1836, the said plaintiff having at that time a pre-emption right to said back land by the laws of congress then in force. The petitioner further alleges, that notwithstanding the premises, the defendant has repeatedly slandered, and still continues to slander and defame his title, and bring it into disrepute, by pretending that said tract of land belongs to him, the said defendant, and not to the plaintiff; that the said defendant has entered upon the land, and has committed and still continues to commit waste, by cutting down, splitting, and carrying away timber. He prays that the defendant be enjoined from committing waste; that the timber now cut down and split on the land in controversy be sequestered; that he may be forever quieted in his title, against the claims and pretensions of the defendant, and that the said defendant be adjudged to pay him damages.

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The defendant and his warrantors deny the plaintiff's allegations, and set up title to the land claimed, under a purchase from the United States, made on the 18th of December, 1833; they also deny the *locus in quo*; pray for a survey; that the injunction and the sequestration be dissolved, and that the plaintiff be adjudged to pay them damages.

In the trial below, the parties abandoned their claim for damages; judgment was given on the titles, in favor of the defendant, and after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

The evidence shows, that one George Sharp, under whom the defendant claims, purchased from the United States, at the time alleged, two tracts of vacant land, of which the land in controversy forms a part, and the chain of conveyance is admitted to be regular and complete; it is also admitted, that the title of the plaintiff to the front tract has been confirmed by the board of commissioners, and it is proved that he purchased the land which he claims, as stated in the petition. From the foregoing statement, it appears that the two parties to this suit have acquired, from the government of the United States, two adverse titles to the

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same tract of land, in apparent conformity with the dispositions of two acts of congress, and we are called upon to say which of said titles is to prevail. We know no other rule of right, where the sovereign is concerned, than that which would, under similar circumstances, govern the transactions of individuals; and we are of opinion that the sale to Sharp, being the first in date, divested, irrevocably, the United States of their right of soil, unless the plaintiff has shown that he had a right of pre-emption to the land claimed, at the time of the defendant's purchase, and that it continued to exist, until he acquired his title.

The act of congress to authorize the inhabitants of the state of Louisiana to enter their back lands, approved on the 5th June, 1832, provides, "that any person owning land in Louisiana, bordering on a water course, and not exceeding in depth forty arpents, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpents in depth, nor in quantity of land that which is contained in his own tract;" but that act also expressly provides, that "*all notices of such claims shall be entered, and the money paid thereon, at least three weeks before such period as may be designated by the president of the United States for the public sale of the lands in the township in which such claims may be situated; and all claims not so entered shall be liable to be sold as other public lands.*" By an act approved on the 24th February, 1835, the time given by the former act was extended one year without any change being made in its provisions, and under this last act, the plaintiff entered and purchased the land in controversy; but previous to the 18th December, 1833, the period designated by the president of the United States, for the public sale of the lands in the township in which that claim is situated, had passed, the land had been offered at public auction, and not being then sold, George Sharp entered it on that day.

We are of opinion, that the act of Congress under which the plaintiff claims was not violated thereby; the right of pre-emption was given to him, provided his claim was filed

three weeks before the public sale of the land in that township, and not otherwise. If that land was offered for sale after the passage of the act of 1832, he lost the preference to which he was entitled, by his own negligence: if it was offered before the passage of that act, he could no longer fulfil the condition upon which only the preference was given, and although he might, perhaps, enter the land in the form and shape of a double concession, he could not do so to the prejudice of previous entries.

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If the act of 1832 had provided, that when the back lands had not been offered for sale, notice of the claim should be entered and payment made three weeks before the period designated by the president for that purpose, it would be a fair inference that the act was intended to apply to all back lands. But the wording of that act is clear, unambiguous, and without reservation. It says, "*all notices of such claims shall be entered,*" which cannot mean that only a part of them shall be entered.

Congress was aware of the situation of the public lands in Louisiana. They knew that part of those lands had been offered at public sale, and others not; if they imposed an impossible condition to some of the front proprietors, it was because they did not intend that the privilege granted should extend to them.

The intention of congress is clearly shown by their former legislation on the same subject; the first act authorizing front proprietors in Louisiana to enter their back lands, was passed in 1811, before Louisiana became a state, and before any of the public lands had been sold or surveyed; it was a valuable privilege to landholders, at a time when there was no other mode of acquiring public lands; but the reason of the law ceased after they had been offered for sale, because the front proprietors could then either buy them at the sale or enter them afterwards, and accordingly we find that the act of 1832 limits the right of pre-emption to the lands not yet offered for sale. The act of 1811, otherwise similar to that of 1832, did not contain that limitation. It gave to all front proprietors in Louisiana, and the plaintiff among the rest, a

So, where A enters back lands on the 18th December, 1833, after the township had been offered at public sale by the President, and B who owns the front tract, enters the same as a back concession in 1836, under the pre-emption law of 1835: *Held*, that the entry and purchase of A divested the government of its title, and B lost his right of pre-emption, which ceased to exist after the land had been offered at public sale.

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privilege to their back lands, provided the entry was made and the money paid within three years from the date of its passage ; in 1820 it was revived for two years, without any change. After the plaintiff failed to avail himself of those opportunities, after he neglected to purchase his back lands when they were offered at public sale, and suffered the defendant to enter them, he can have no just ground of complaint, for being deprived of a privilege, burthensome to others, and which he had enjoyed for five years at two different times, without attempting to exercise it. Congress cannot, without injustice to the public, take better care of individuals than they chose to take care of themselves.

If the plaintiff had been entitled to a pre-emption under the act of 1832, he would have lost his right, by suffering the time allowed by that act to expire, without availing himself of its provisions. The sale to George Sharp took place while that act was in force, and it has been contended at the bar that it was a nullity, because the land which it purported to convey was at that time set apart and reserved for front proprietors. To test the correctness of this position, let us examine what would be now the situation of the defendant, if the plaintiff had never filed his claim ; he has paid for the land ; he holds it by a sale from the United States, and by that sale they pledge their faith that it shall not be sold to another. He is in possession, and could never be disturbed ; we hold this to be a title. Had the act of 1832 been suffered to expire by its own limitation, the case supposed would have occurred. The revival of that act, for another year, ought not, in our opinion, to affect the defendant ; his vested rights could not be taken from him by subsequent legislation. He acquired from the government a title which was to become indefeasible on the 15th of June, 1835, provided the plaintiff did not file his claim till after that date ; and the plaintiff filed his claim on the 14th June, 1836.

The rights acquired by a purchaser of public lands, according to the provisions of the pre-emption act of 1832, are vested, and cannot be taken from him by a subsequent act in 1835, reviving the former law for one year.

We are of opinion that the sale to George Sharp divested the United States of their right of soil, and that nothing passed under the sale subsequently made to the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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REYNAUD'S H'RS.
vs.
PEYTAVIN'S
EXECUTORS.

REYNAUD'S HEIRS vs. PEYTAVIN'S EXECUTORS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ASCENSION.

Where the heirs of a deceased partner, who are all of age, renew the partnership with the surviving partner, and suffer the partnership property and effects to remain during five years, under his exclusive control and management, it will be presumed they were satisfied with his diligence, and they cannot claim from his executors *profits that he might have made*, on the ground of negligence or mismanagement.

In a universal partnership, under the Spanish law, the personal and household expenses of the individual partners, were chargeable to the firm, however unequal they might be in amount.

This case comes up on an opposition made by the heirs of the deceased Louis M. Reynaud, to the account and tableau of distribution, filed by the executors of Antoine Peytavin, deceased. The executors filed their tableau, and gave notice to all the creditors of A. Peytavin, and of the partnership lately existing between Louis M. Reynaud and A. Peytavin, and to all persons interested, to show cause why the said account and tableau should not be homologated.

The heirs set up various objections to the executors' account, and conclude, that the partnership which existed between their ancestor and the late A. Peytavin, is indebted to them as follows :

To Songy Reynaud in the sum of nine thousand and forty-three dollars on account.

To Felicite D. Reynaud and the other heirs, a large sum not specified. That the mass of the partnership should be settled. 1. By taking the price of the sale made of the

EASTERN DIST. partnership property in 1833, with interest on each instalment at ten per cent. per annum. 2. The debts due to the partnership, whether by the partners or others. 3. The amount the heirs may have to collate. From these, deductions are to be made. 1. Of debts of the partnership paid by Peytavin. 2. Debts due by the partnership to the partners. 3. Bad debts.

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vs.
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EXECUTORS.

The opponents then pray that the tableau be corrected by crediting the partnership. 1. With the price of the partnership property sold in 1833, at the time each instalment became due. 2. With ten per cent. per annum interest on each instalment, &c. 3. With twenty thousand dollars due to the partnership by A. Peytavin, for his personal and household expenses, from the year 1828 until 1833. 4. With the further sum of one hundred and forty thousand dollars, being the amount of the net proceeds of crops not accounted for.

The opponents further pray that the executors be ordered to pay them in their quality of creditors, the several sums that may be found due them, on a definitive settlement, &c.

The material facts of this case are stated in the opinion of the court, which follows.

The judge of probates, after hearing the evidence and the arguments of counsel of the respective parties, overruled the opposition, and the plaintiffs in said opposition appealed.

M. Taylor, for the opponents.

J. Seghers, contra.

Rost, J., delivered the opinion of the court.

This is an opposition of the heirs of a partner to the account of the partnership, filed by the executors of the other. The material facts of the case are as follows :

In 1806, Jean Reynaud and A. Peytavin formed, by notarial act, an universal partnership, which was to continue for five years ; their property consisted of houses, plantations, slaves, ships, credits, merchandize, &c. Jean Reynaud died

in 1807; and in 1821, his widow and A. Peytavin, acknowledged by a notarial act, that the partnership had continued by mutual consent between them, and agreed that it should thereafter continue, until it pleased one of the partners to dissolve it. A statement was made of all the property, rights, and credits of the firm. The last partnership was dissolved by the death of Madam Reynaud, in 1828; it was renewed by the present plaintiffs in opposition, for one year, and afterwards the partnership property was left by them under the management and control of A. Peytavin, until the beginning of 1833. An inventory was then made of it in presence of the parties interested, and appears to have been considered by them as including all the property, rights and credits of the firm; it included property acquired since 1821, with the profits made, and embraced all that A. Peytavin possessed at that time.

The property inventoried was afterwards sold on a credit of one, two and three years, to effect a partition, and the instalments if not paid at maturity, were to bear interest at the rate of ten per cent. per annum, after they became due until paid. At that sale, A. Peytavin purchased to a large amount, and died shortly afterwards. The property was sold a second time by his executors, who, after receiving the proceeds, have filed a general account of their administration, including an account of the succession with the firm of Reynaud & Peytavin. The executors, in that account, have charged the succession with the proceeds of the sale of the partnership property, reduced to cash, at the date of said sale, by a discount at the rate of eight per cent. per annum, upon the different instalments.

Songy Reynaud, one of the plaintiffs in opposition, had a private account against the succession, which had been previously accepted by the executors, and admitted without opposition by the attorney of absent heirs. The executors have placed him in the tableau for a sum less than the amount of that account.

The plaintiffs in opposition being the children and heirs of Jean Reynaud and his wife, opposed the homologation of the

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account, and ask that it be amended by crediting the partnership with the following sums :

I. The whole amount of the property sold in 1833.

II. Interest at the rate of ten per cent. per annum, from the maturity of each instalment, till the final settlement of the succession, credit being given for the partnership debts paid by the testator.

III. The sum of twenty thousand dollars for the personal and household expenses of A. Peytavin, while he administered the affairs of the partnership.

IV. One hundred and forty thousand dollars, which they supposed ought to have been the value of the crops, made on the plantations of the firm, if they had been well managed.

V. Songy Reynaud further asks to be placed on the tableau for the whole amount of his account.

The Court of Probates after hearing the parties, overruled the opposition, and the heirs of Jean Reynaud appealed.

The first and most important question in this case is, whether A. Peytavin's executors are bound to account to the plaintiffs in opposition, for the crops which might have been made on the partnership plantations, and for the personal expenses of the testator. One of the executors having been the factor of the testator since 1824, an account is produced by the firm to which he belongs, showing the proceeds of the crops made upon the partnership property from 1824 to 1833, and also the expenses incurred during that time ; the balance found in that account is charged to the succession, and the plaintiffs in opposition do not object to it : they do not pretend to charge A. Peytavin with fraud, but only with negligence. Whatever might have been the nature of the partnership, the fact, that after the death of their mother, the plaintiffs, being all of age, renewed it, and suffered the property to remain, during five years, under the exclusive management and control of the testator, sufficiently proves, that they were satisfied with the degree of diligence which he used, and leaves them without the shadow of a right to claim damages at this time, under an universal partnership.

Where the heirs of a deceased partner, who are all of age, renew the partnership with the surviving partner, and suffer the partnership property and effects to remain during five years under his exclusive control and management, it will be presumed they were satisfied with his diligence, and they cannot claim from his executors, profits that he might have made, on the ground of negligence or mismanagement.

This right could not have existed, for that kind of association, operated between the partners a confusion of property, incompatible with strict accountability. All the private expenses, no matter how unequal they might be, were paid out of the common fund, and at the dissolution of the partnership, the property and profits that remained were divided equally between the partners, without taking into consideration that one had gained, wasted, or consumed more than another. *Curia Philipica verbo Compagneros, articles 5, 6, 7, 8, 9, Partida 5, title 10, l. 2, 5, 6, 7. Pothier Contract de Société, article 37.*

The code of 1808, made some changes in those laws, but they do not affect the present case; and the claims of the plaintiffs for the profits which might have been made, and for the personal and household expenses of the testator cannot be sustained.

The manner of stating the account is unusual and singular, but the plaintiffs in opposition have failed to show that it was injurious to them. By the act of partnership between Madame Reynaud and the testator, the latter bound himself that at the dissolution of the firm, the share of each of the plaintiffs should, under no circumstances, be less than four thousand dollars, and that he would make up the deficiency. Their share, by the amount rendered is only one thousand and seventy-eight dollars, and seventy-six cents, and the balance up to the sum of \$4000, is charged to the testator and credited to them. If the amount was amended as they desire, their share would be less than what they receive.

The demand of Songy Reynaud to be placed on the tableau for the whole amount of his private account, appears to us well founded. If the acknowledgment of the executors, and the admission of the attorney of absent heirs were made in error, that fact ought to have been alleged and shown on the trial of the opposition. The plaintiff may have had legal evidence of every item of his account, but he was not bound to produce it as long as the acknowledgments of the executors stood. The other parties have shown no error to their prejudice.

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In an universal partnership, under the Spanish law, the personal and household expenses of the individual partners were chargeable to the firm, however unequal they might be in amount.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be avoided and reversed ; that Songy Reynaud be placed upon the tableau, for the sum of nine thousand and forty-three dollars and eighty-two cents, instead of six thousand six hundred and seventy-nine dollars and six cents ; and that the amount, as amended, be homologated and approved, and the funds distributed in conformity therewith. It is further ordered, adjudged and decreed, that the defendants and appellees pay the costs in both courts.

HIRIART vs. ROGER ET AL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT FOR THE PARISH OF LAFOURCHE INTERIOR, THE JUDGE THEREOF PRESIDING.

A simulated sale, as between the parties, is absolutely null.

Where the evidence establishes fraud on the part of the purchaser, the sale will be declared fraudulent and void as it regards creditors, at the suit of a creditor of the original vendor.

This is an action by a creditor to annul certain sales from his debtor to the defendants, as having been made in fraud of creditors.

The plaintiff shows that he obtained a judgment against Auguste Roger, in the parish of Lafourche Interior, on the 2nd October, 1835, for one thousand three hundred and fifty dollars, with interest and costs. He further shows that his debtor, A. Roger, conveyed a lot of ground and a certain female slave, to one Mathurin Bourg, by acts *sous seing privé*, in January and October, 1828, which were attested by two witnesses and duly recorded ; and that a few days afterwards Bourg sold and conveyed said lot and slave, with her child, by public act, to Valery Roger, the son of the original vendor, dated the 10th November, 1831. On the next day, Auguste

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13	126
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Roger sold and conveyed another lot of ground, in the town of Thibodeauxville, where the first is situated, to his son, Valery Roger. These sales are all alleged to be simulated and fraudulent, as regards the plaintiff, who is a judgment creditor of the vendor, and he prays that they be annulled and set aside, and the property sold to satisfy his demand against the original debtor, Auguste Roger.

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In an amended petition, the plaintiff shows that the slave conveyed from Bourg to V. Roger has since died, leaving a child named Zoë, and that this child, and one of the lots in question, are in possession of Madame Exnicious and her minor child, and the other lot has been sold to one G. C. Bedford, who were all made parties, and the same judgment demanded against them as against V. Roger and M. Bourg. Bedford admitted he had purchased one of these lots from one Jacques François Brunot, who bought it from V. Roger. He prayed that if a recovery was had, and the sale of the lot annulled, that he might be released from his obligation to his vendor.

The other parties all appeared and made defence. They denied all fraud, and assert title under the sales and transfers to them. The respective titles and acts of sales between the parties were produced, and evidence offered on both sides.

The district judge was satisfied, from the evidence, that the several sales by which this property, once belonging to Auguste Roger, was attempted to be placed beyond the reach of his creditors, were void as regards the plaintiff, and must be set aside, and the property sold to satisfy his demand or debt; and that the sale from V. Roger to Brunot be cancelled, and the price thereof returned.

V. Roger, Madame Exnicious, and Brunot, appealed.

Beatty, for the plaintiff and appellee.

Taylor, for the defendants and appellants.

Eustis, J., delivered the opinion of the court.

The plaintiff alleges, that on the 2nd of October, 1835, he obtained judgment against Auguste Roger, for the sum of

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one thousand three hundred and fifty dollars, with interest and costs; that the said judgment was rendered on a debt which existed prior to the date of the several conveyances of which he afterwards complains.

That on the 7th day of January, 1828, the said Auguste Roger conveyed a female negro slave named Eliza, then aged about eighteen years, to Mathurin Bourg, and on the 2nd day of October, in the same year, he conveyed to the said Bourg a certain lot of ground, in the town of Thibodeauxville, with the improvements thereon; these conveyances were both under private signature, but were afterwards duly recorded.

That afterwards, by public act, of the 10th of November, 1831, the said Bourg conveyed the said lot and the slave, with her child, to Valery Roger, the defendant, the son of Auguste Roger, and on the 11th of November, 1831, the said Auguste Roger sold another lot in the town of Thibodeauxville, described in said act, to the said Valery Roger.

That the slave Eliza died, leaving a child named Zoë: that part of said principal lot, having fifty feet front on the Bayou, is in possession of Madame Exnicious, the daughter of the said Auguste Roger, and her minor child, Marie C. Exnicious; that the remainder of the lot, and the slave child Zoë, is in the possession of the defendant, Valery Roger, and that the lot sold by Auguste Roger, to Valery Roger, is in the possession of George C. Bedford. These sales are all alleged to be fraudulent, and made with the intention to defraud the creditors of Auguste Roger; the usual allegations necessary to support the action are made; judgment is asked accordingly, and relief is prayed for against all the parties who are in the possession of the property. After issue joined, Bedford disclaimed, and reconveyed the lot he purchased to one of the defendants, J. F. Brunot. The debt on which the plaintiff obtained judgment in October, 1835, we shall assume originated on the 27th of May, 1831, the date of the notes on which the suit is brought.

We consider the sales made to Mathurin Bourg as absolutely null; the evidence is conclusive on this point; and

that during the time the property remained in his name, it was to all intents and purposes the property of the father of the defendant. On the subject of simulation, we consider the law as settled. See *Merlin, Reportoire de Jurisprudence, verbo Simulation, section 3*. The opinions of juriconsults are there given. D'Argentrée, speaking of agreements of this description, says, "*colorem habent, substantiam vero nullam, nulla quippe conventio initur, nullus contractus agitur, sed fingitur*." Baldus describes a convention like this under consideration as "*corpus sine animâ et dicitur coloratus, depictus, extrinsecus apparet, intrinsecus nihil habens*." It is due to Mr. Bourg, who was examined in this case, to state, that he disclosed fully the nature of the pretended transfers, without any reserve or disposition to conceal it.

We consider that it is proved that the sale of the lot of ground and slave, from Mathurin Bourg to the defendant V. Roger, was fraudulent on the part of the purchaser, and void as it regards creditors.

The plaintiff has established the facts necessary to enable him to recover in this action under the provisions of the civil code. We do not think the evidence establishes fraud on the part of Madame Exnicios or Brunot, two of the defendants, who hold, under purchases from the defendant, part of the property sold by Auguste Roger to his son Valery Roger. We disallow the claim for improvements set up by the defendant, Valery Roger. The judgment of the court below must be reversed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, that the plaintiff have judgment against the defendant, Valery Roger; that the sales of the property, to wit, the lot of ground in the town of Thibodeauxville, described in the act of sale from Auguste Roger to Mathurin Bourg, and mentioned in the plaintiff's petition, and the slave Zoë, (except as hereinafter mentioned,) be avoided and annulled as to its effect on the plaintiff; and that said lot and slave, or a sufficient part thereof to satisfy

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A simulated sale, as between the parties, is absolutely null.

Where the evidence establishes fraud on the part of the purchaser, the sale will be declared fraudulent and void as it regards creditors, at the suit of a creditor of the original vendor.

EASTERN DIST. the plaintiff's debt, with interest and costs, be sold under
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 of the same; and that the appellee pay the costs of the
 appeal.

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And it is further ordered, that judgment be entered in favor of Madame Exnicios, in her own right and as tutrix of her minor child; and of Jacques François Brunot, with costs in both courts.

DOZER vs. SQUIRES, DONNAUD ET AL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE PARISH OF LAFOURCHE INTERIOR, THE JUDGE OF THE FOURTH PRESIDING.

A person who has a mere equitable interest in property, is not allowed to question the validity of a sale of it, when he permitted the legal title to remain in another, and when it passed into the hands of *bona fide* purchasers, without notice.

This suit is composed of two consolidated cases, of Dozer vs. Squires, and Dozer vs. Donnaud, and others, called in warranty, in which the plaintiff claims two half lots of ground, situated in the town of Thibodeauxville, and in the possession of the defendants, Squires and Donnaud.

The plaintiff shows that he was owner of the entire lot in question, and that in January, 1831, the deputy marshal levied an execution thereon, which issued on a judgment obtained in the United States District Court for the Eastern District of Louisiana, by the postmaster general, against him, and the lot was, after two advertisements, sold the 1st April, 1831, and adjudicated to Pierre Cazeaux, for the sum of three hundred dollars, in a twelve months bond.

The plaintiff further shows, that trusting to Cazeaux to pay the twelve months bond, and fearing no disturbance, he

refunded to him the amount, and did not immediately procure a re-transfer of the title to said property ; but that before the expiration of the bond, Cazeaux died, and his heirs or legal representatives having failed to pay the bond when it became due, the lot of ground was seized and sold to satisfy the amount thereof.

The present defendants derive their title from the sale on the twelve months bond by the deputy marshal. The plaintiff alleges various informalities and nullities in said sale, which he prays may be annulled and set aside, and that he be declared the true owner, and have judgment for the rents and profits accruing from the property.

The defendants set up title and called in their warrantors to defend.

The district judge rendered judgment upon the evidence in the case, in favor of the plaintiff, decreeing him the property, and reserving for future trial the question of rents, profits, and improvements, between the parties. The heirs of Pierre Cazeau, called in warranty, appealed.

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Beatty, for the plaintiff and appellee.

Miles Taylor, for the appellants.

Eustis, J., delivered the opinion of the court.

The plaintiff claims two lots of land, which are in the possession of the principal defendants. He alleges, that the lot, which has since been subdivided, originally belonged to him, and was illegally sold by the marshal of the United States, on an execution issued against him from the court of the United States, and sets up several causes of illegality in the sale. It appears, however, that he permitted the vendee to remain in possession of the property, that he furnished him with the money to pay a part of the price—that part which could lawfully be paid to the creditor on the execution—and stipulated in a written lease that the lessee should pay the rent, for a term of years, to the purchaser. Of these facts the records contain written proof.

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On the twelve months bond given for the property by Cazeaux, the purchaser, it was again sold, under execution which issued against him on the 10th of April, 1833, to Maggioli, from whom it passed by several mesne conveyances to the present possessors.

The validity of the sale to Cazeaux, we are of opinion, cannot be contested by the plaintiff, because it has been voluntarily executed by him ; that such is the necessary consequence of his acts.

He suffered the property to be seized and sold as the property of Cazeaux, in whose name it stood under the sale from the marshal. Admitting that he had an equitable interest in the property, by the sale to Maggioli his equity was extinguished, and the property passed unincumbered through the hands of the different intermediate proprietors to the present owners, neither of whom are pretended to be charged with notice. A person who has a mere equitable interest in property is not allowed to question the validity of a sale of it, when he permitted the legal title to remain in another, and when it has passed into the hands of *bona fide* purchasers without notice. See the case of *Harris vs. Denison*, 8 Louisiana Reports, 543. This view of the subject renders it unnecessary to consider the other points made by counsel.

A person who has a mere equitable interest in property, is not allowed to question the validity of a sale of it, when he permitted the legal title to remain in another, and when it passed into the hands of *bona fide* purchasers without notice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

KENYON *vs.* BERGHEL, F. W. C.

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APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF EAST BATON ROUGE, THE JUDGE OF THE EIGHTH PRESIDING.

KENYON
vs.

BERGHEL, F. W. C.

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Parole evidence may be received to prove a verbal agreement, in regard to the occupation and repair of certain buildings, although there be a written lease, if the agreement relates to a separate matter not contained in the lease.

Parole evidence will be disregarded in construing a written lease, but may be received in proof of a contract posterior to the lease.

This is an action to recover from the defendant two hundred and seventy-five dollars and eighty-four cents, for materials furnished, and for repairs made, and for work done on the defendant's building, according to an account annexed.

The plaintiff also claims three hundred dollars in damages, for the failure of the defendant to have the building in question fitted up, and the necessary repairs put on it, by the 1st of September, 1835, to render it habitable, and available to the plaintiff, as a boarding house for the accommodation of travellers, for which purpose he rented and leased it. He prays judgment for the amount of his account, and damages, as alleged. He also alleges that his services, for work and repairs made on the premises, were worth the sum charged.

The defendant pleaded a general denial, and also denied specially the allegations in the petition. And for further answer, she averred there was a written contract of lease of the premises in question by her to the defendant, which she annexes, and prays that the suit be dismissed.

Upon these pleadings and issues, the cause was tried before the court and a jury.

Several bills of exception were taken to the opinion of the court, which are stated in the opinion of this court, which follows.

The district judge charged the jury, that the evidence in the case, disclosing a written contract of lease, also showed that the pretended verbal contract for repairs related to the same house. The defendant's counsel required the judge to

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charge the jury that they must disregard all the parole evidence, as a written contract of lease was disclosed to have been executed on the same day as the pretended verbal one.

The judge refused so to charge the jury, but charged them that they were to disregard any oral testimony in construing the written contract of lease ; but if they believed, from the testimony, that there existed a separate, independent verbal contract, respecting the finishing and repairing the house, the same might be proved by parole testimony. The judge further charged the jury, that the obligation of the defendant to pay the plaintiff in part, as alleged in the petition, grew out of an implied, or *quasi* contract, on a *quantum meruit*. The defendant's counsel objected to this part of the charge also, on the ground that a *quasi* contract did not give rise to such an obligation. That the right of the plaintiff, if any he had, grew out of the provisions contained in the 2697th article of the Louisiana Code, giving the plaintiff the right to remove the improvements he had made on the premises he had leased, unless the defendant thought proper to retain them, on paying a fair price.

The judge further charged, "that in this case one of the counts or allegations in the petition, claimed a certain sum on a *quantum meruit*, for services rendered ; that our laws recognized the doctrine, that where one person renders services to another, whereby the latter is benefited, that it raises an implied contract that the former shall be remunerated." To all of these charges the defendant's counsel excepted.

The jury returned a verdict in favor of the plaintiff, for two hundred and sixty-one dollars and sixty-seven cents. From judgment confirming the verdict, the defendant appealed.

Elam, for the appellant.

Avery, contra.

Martin, J., delivered the opinion of the court.

The plaintiff states, that he rented from the defendant a

house, intended to be occupied as a boarding house, which the latter promised to repair and improve, so as to render it fit for the purpose for which it was rented, which she neglected to do ; and the plaintiff was at great cost and expense in having it done. The object of the present suit is to recover the amount so expended, and damages.

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The defendant pleaded the general issue, and that no contract intervened between the parties, except one of lease, which was reduced to writing, and contains no obligation on defendant to make the repairs and improvements mentioned in the petition. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Our attention is arrested by two bills of exception ; the first is to the admission of parole evidence, to prove the contract alleged in the petition, on the ground that there was a written one, in which the plaintiff agreed to receive the house in the condition in which it then stood, and that there could not exist, at the same time, two separate and independent contracts relative to the said lease. The objection was overruled, on the ground that it might appear from the evidence that the verbal contract related to a separate building ; and further, that a verbal contract concerning the finishing and improving said property might exist independent of, and unconnected with the lease.

The second bill is to the refusal of the judge to charge the jury, that the evidence disclosing that the lease and parole contract related to the same building, the jury ought to disregard the parole evidence of what may have been said before, at the time, or after the execution of the lease. The court instructed the jury to disregard the testimony in construing the written contract ; but if they believed that there existed a separate verbal contract respecting the finishing and repairing the house, it might be proved, and that the obligation of the plaintiff grew out of an implied or *quasi* contract, on a *quantum meruit*. The defendant requested the judge to charge, that the defendant's obligation, if any, resulted from the Louisiana Code, article 2697, giving the lessee the right to remove his improvements, unless the les-

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Parole evidence may be received to prove a verbal agreement in regard to the occupation and repairs of certain buildings, although there be a written lease, if the agreement relates to a separate matter not contained in the lease.

Parole evidence will be disregarded in construing a written lease, but may be received in proof of a contract posterior to the lease.

sor pay a fair price therefor. The judge further charged, that there was a count in the petition for services, on a *quantum meruit*; and that the law recognizes the doctrine, that when one renders services beneficial to the other, an implied contract is raised for remuneration.

I. As to the first bill of exceptions, it is incorrectly stated therein, that the lessee bound himself by the lease to receive the premises in the condition in which they were. Had this been the case, it might be questioned whether it could be shown, that immediately after the execution of the lease, an oral agreement was made, directly in contradiction to the lease; for this might be said to be prohibited by the Louisiana Code, article 2256, which forbids the admission of parole evidence against what is contained in acts, or what is said since making them; but this is not attempted, and evidence is offered of a second and distinct agreement on an object not mentioned in the lease. It does not appear to us that the court erred.

II. On the second bill, the court correctly charged the jury to disregard the parole evidence in construing any part of the lease; but to attend to it as the proof of a contract posterior to the lease. We do not see that there was any necessity to direct the jury to the consideration of the article of the Louisiana Code relied on by the defendant. The amount of the plaintiff's claim was correctly stated to be on a *quantum meruit*. The latter part of the charge ought to have been restrained to services rendered, at the instance and request of defendant; or as a *negotiorum gestor*,—but this modification was not necessary in the present case, which is that of damages sought from the defendant, for having failed to do what she had promised.

III. On the merits, it appears to us that the plaintiff has made out his case, and is entitled to the verdict and judgment he has obtained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

CULLIVER vs. GARRIC ET AL.

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APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF EAST BATON ROUGE, THE JUDGE OF THE EIGHTH PRESIDING.

CULLIVER
vs.
GARRIC ET AL.

Where the party failed to procure the necessary evidence to support his title, and the justice of the case seems to require it, the cause was remanded for a new trial.

This case was before the court at a former term and a judgment of non-suit entered, because of the failure of the plaintiff to produce evidence of authority to the United States agent, (Capt. T. S. Rogers,) from the war department, to convey title to the lot of ground in question. 11 *Louisiana Reports*, 88.

On the return of the cause to the District Court, it was again tried before the court and a jury.

The plaintiff was only able to trace Capt. Roger's authority to the quarter-master general's department, when, by the provisions of the act of congress, which authorized the sale of this lot with other property of the like kind, the secretary at war is expressly required to cause such sales to be made. The authority of the war department was not shown on the second trial, and this link in the plaintiff's chain of title is still wanting.

The jury, under the instructions and a charge from the court, returned a verdict for the defendant in possession, and the plaintiff appealed.

Elam, for the plaintiff and appellant.

R. N. and A. N. Ogden, contra.

Martin, J., delivered the opinion of the court.

This case was before us in May term, 1837, and remanded for a new trial. The defendant has had a verdict and judgment, from which the plaintiff is appellant. 11 *L. R.*, 88.

The facts of the case are plainly stated in our former opinion; in which, judgment as in case of non-suit, was

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Where the party failed to procure the necessary evidence to support his title, and the justice of the case seemed to require it, the cause was remanded for a new trial.

given, because the plaintiff had failed to produce the authority of the officer under whose conveyance he claimed. He has not been more successful after the return of the case to the District Court. The facts of the case show that he obtained the land by a contract of exchange, legal evidence of which he failed to administer. The justice of the case, when it was before us formerly, and now, appears to require that he should be afforded a further opportunity of obtaining from the secretary of war legal evidence of the contract, by which he transferred to the United States a tract of land in exchange for the one which it is his object in the present suit to obtain.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside and the case remanded for a new trial, the appellee paying the costs of the appeal.

THOMPSON vs. WILSON'S EXECUTOR.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF IBERVILLE.

Parole evidence will be admitted to prove the hand writing of a subscribing witness to a written instrument, after every diligence has been used in vain to find him out, even without showing that he is dead or resides out of the state.

A surety has the right to claim an indemnification, by instituting suit against his principal, even before making any payment; *a fortiori* when a judgment has been obtained against him, he may demand indemnification without payment.

When the surety has paid *upon, or after being sued*, even without informing his principal debtor, he has his recourse although the debtor was in possession of the means of having the debt declared extinct.

When circumstances existed at the creation of the debt, which enabled the debtor to resist payment, still if he suffers his surety to remain ignorant of them, and the latter pays, he will be bound to indemnify him. ,

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THOMPSON

vs.

WILSON'S EX'N.

The absence of, or insufficiency of consideration, may be opposed to the creditor, but not to the surety, who has paid or is liable to pay, especially when he is ignorant of such defence.

The plaintiff alleges, that Eliza Wilson, late of the parish of Iberville, being indebted to one John McDonough in the sum of twelve thousand and seventy-five dollars and thirty-four cents, did by her attorney in fact, D. D. Chesnut, on the 18th day of May, 1833, make and execute her promissory note, in which she promised to pay to the order of this petitioner, on the 4th May, 1834, at the Bank of Louisiana, in New-Orleans, the said sum of money, which note he endorsed as surety, together with Lavinia Erwin, and it was delivered to the said McDonough for the debt aforesaid. That at maturity it was protested for non-payment, and Eliza Wilson, the maker, having failed to pay it, suit was instituted, and judgment for the amount thereof obtained against this petitioner, after every legal defence was made, and for which he is liable and bound to pay as endorser or security, together with interest and costs.

The plaintiff further shows, that Eliza Wilson died during the pending of these proceedings, in the parish of Iberville, leaving a large estate, and where her succession is opened, and that Wm. E. Edwards, Esq., has been appointed dative testamentary executor, and is now the representative of said succession. He further states that he frequently demanded of Mrs. Wilson in her life time, and of the executor since, to discharge said note or obligation and to relieve him from his suretyship, which they have neglected and refused to do. He therefore prays that the executor be condemned to pay and discharge said note to the said John McDonough or to him, for the use of the latter, and that the property of said succession be seized and sold to satisfy and discharge the same.

The defendant after pleading an exception to the jurisdic-

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tion of the Probate Court, and having craved *oyer* of the instrument of writing sued on, pleaded the general issue, and averred that the husband of Mrs. Wilson, in 1819, gave his note to one Thomas Durnford for a small loan of four thousand eight hundred dollars, which was subsequently assigned to John McDonough, and formed the only basis of the present debt, alleged to be due in the form stated. He admits that D. D. Chesnut made the note now in suit, but without the authority or knowledge of Mrs. Eliza Wilson, and specially denies that he had any power of attorney to execute said note as her attorney in fact; that said note never had any other consideration than the loan of money as above set forth, made by Durnford to N. Wilson, which was long since and before the giving of the note sued on, extinguished by prescription; that no consideration existed for said note, or if it did, it was only for the amount of four thousand eight hundred dollars, which was prescribed, and upon which amount usurious and compound interest was charged, until it swelled to the enormous sum of twelve thousand and seventy-five dollars and thirty-four cents.

The defendant further avers that D. D. Chesnut had no authority to execute said note, that Thompson when sued by McDonough, suffered himself to be condemned without informing Eliza Wilson or her representatives, who would have furnished the means of defence to defeat the action; that they were never notified of the suit, and that he as executor is not liable to indemnify Thompson. He prays that the plaintiff's demand be rejected with costs.

Upon these pleadings and issues, the parties went to trial.

The record and judgment of the suit of McDonough against Thompson, as surety or endorser of the note now in suit, was offered in evidence. A bill of exception was taken to the admission of parole evidence to prove the hand writing of Jesse Munson, a subscribing witness to the power of attorney executed by Mrs. Eliza Wilson to D. D. Chesnut, and under which he acted in signing the note sued on.

After hearing all the evidence and the arguments of counsel, the judge of probates gave judgment for the plaintiff, and the defendant appealed.

Labawee and *Edwards*, the latter in *propria persona*, for the appellant. EASTERN DIST.
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Winchester, contra.

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vs.
WILSON'S EX'rs.

Martin, J., delivered the opinion of the court.

The plaintiff, endorser of a note of the defendant's testatrix, on which judgment was obtained against him, and affirmed in this court, in the case of *McDonough vs. Thompson et al.*, 11 *Louisiana Reports*, 66, prays to be relieved as her surety, and that the defendant may be decreed to pay the amount of said note to the holder, or to himself.

After the general issue, the answer avers, that the plaintiff endorsed the note stated in the petition, drawn by Chesnut, in his capacity of attorney of the testatrix, as her surety ; but that the said Chesnut was without authority to subscribe the said note, as the attorney of the testatrix ; that there was no consideration for which the said note was given, except a sum of four thousand eight hundred dollars, which her husband had borrowed from the payee, and that the plaintiff suffered himself to be sued, and judgment to be obtained and affirmed, without giving any notice to his principal, who might have furnished him with evidence to establish the illegality of the consideration, the sum being partly made up of compound and usurious interest, etc.

The Court of Probates gave judgment in favor of plaintiff, for the amount of the judgment obtained against him, but ordered that the money thus made be brought into court, there to remain, for the indemnification of the plaintiff, etc.

Our attention is drawn to a bill of exceptions to the admission of parole proof of the signature of the testatrix, to a paper purporting to be her power of attorney to Chesnut, mentioned in the petition, by two persons well acquainted with her hand writing, on the ground that there was a subscribing witness to the power, by whom alone the signature could be proved, unless his death, or residence out of the state, was first proven. The Court of Probates was of opinion, that his absence was fully established. The record shows, that a subpoena was taken out for the subscribing witness, on

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Parole evidence will be admitted to prove the handwriting of a subscribing witness to a written instrument, after every diligence has been used in vain to find him out, even without showing that he is dead, or resides out of the state.

A surety has the right to claim an indemnification by instituting suit against his principal, even before making any payment; *a fortiori* when a judgment has been obtained against him, he may demand indemnification without payment.

When the surety has paid *upon* or *after* being sued, even without informing his principal debtor, he has his recourse, although the debtor was in possession of the means of having the debt declared extinct.

which the sheriff returned that he was not to be found in the parish. Taylor deposed, that the subscribing witness is not an inhabitant of the parish, within his knowledge; that he has made search for him without success; has written to the parishes of St. Mary and St. Martin, to obtain information relating to him, but has received no answer; that he understood he was living with a Mr. Rogers, near Pattersonville, in Attakapas; wrote to him, but received no answer; he has seen a neighbor of Mr. Rogers, who knew no such person as the subscribing witness at Mr. Rogers's. He has made frequent inquiry, to discover the residence of the subscribing witness, without being able to do so.

On these facts, we think the court did not err, in concluding that the absence of the subscribing witness was sufficiently accounted for, and correctly admitted proof of his handwriting, and that of his principal. *Louisiana Code, article 2241; Code of Practice, article 325.*

On the merits, it appearing that the plaintiff, as a surety for the testatrix, endorsed a note of hers, duly executed by her attorney in fact, that the note having been protested, and suit brought for its amount, and judgment obtained therefor against the plaintiff, he has a right to demand an indemnification, although he has not made any payment. The Louisiana Code, article 3026, provides that a surety may, even before making any payment, bring a suit against the debtor, to be indemnified by him, when there exists a lawsuit against him for payment—*a fortiori* when judgment has been obtained.

The same code, article 3025, provides, that when the surety has paid without being sued, and without informing the principal debtor, he shall have no recourse against the latter, provided, that at the time of payment the debtor was in possession of such means as would have enabled him to have the debt declared extinct. This is a negative, pregnant with the affirmative, that when the surety has paid, upon or after being sued, even without informing the principal debtor, he shall have his recourse against the latter, although the debtor was in possession of such means as would have enabled him to have the debt declared extinct.

The code in this article speaks of a debt which has been extinguished, and, perhaps, is not to be extended to a debt from which the principal could have been relieved ; as that for which judgment has been obtained against the present plaintiff. When a debt has become payable, the principal has some ground to expect that the surety before he pays it, will inquire whether it has not been paid by the former ; it is otherwise when the creation of the debt was attended with circumstances which enabled the debtor to resist payment. In the latter case, the principal who suffers his surety to remain ignorant of these circumstances, is without excuse.

The absence or insufficiency of the consideration may be opposed to the creditor, but not to the surety, especially when he is ignorant that relief may be had on that ground.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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When circumstances existed at the creation of the debt which enabled the debtor to resist payment, still if he suffers his surety to remain ignorant of them, and the latter pays, he will be bound to indemnify him.

The absence of, or insufficiency of consideration may be opposed to the creditor, but not to the surety, who has paid or is liable to pay, especially when he is ignorant of such defence.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF IBERVILLE, THE JUDGE THEREOF PRESIDING.

An amendment of the answer, changing the defence from a contract of lease to one of sale, will be allowed when it is in accordance with the principles settled in the case by this court, remanding it for a new trial.

The plaintiff may amend his petition, so as to embrace an act of sale, anterior in date to the one sued on ; provided it does not *change* the title, but only *furnishes additional evidence* of it.

A *bona fide* vendor, on eviction of his vendee, since the adoption of the Louisiana Code, is not bound to indemnify the latter for *profits not made*, or restore absolutely the *increased value* of the thing sold, above the price of the original sale.

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But in cases of eviction, such increased value of the thing sold, above the price of the original sale, as the parties might have reasonably anticipated at the time of the contract, should be considered as *profits made* by the buyer, and ought, in all cases, to form a part of the damages for which the vendor is liable on his warranty.

The defendant on eviction, will be allowed to produce evidence of the *increased value* of the property at the time of eviction, above the original price at which he purchased.

This case was before the court at the February term, 1837, and remanded for a new trial. *Vide* 10, *Louisiana Reports*, 524.

On the return of the cause to the District Court, both parties attempted to amend their pleadings by leave of court, which were objected to by the adverse party.

The first bill of exception is taken to an amended petition of the plaintiffs, setting up an act of sale from Joseph Erwin to Abram Wright, of the premises in question, dated the 12th June, 1824, in addition to the act of the 13th of May, 1827, which was taken as the basis of this suit.

The defendants' counsel objected to the amendment on the ground that it changed the whole nature of the demand, &c. The court sustained the objections, the amended petition was rejected and the plaintiffs' counsel took a bill of exceptions to the opinion of the court.

The defendants amended their answer, and treated the act of the 13th May, 1827, as a *sale* instead of a lease, and shaped their defence accordingly, and which had been so declared by this court when the case was formerly before it.

The plaintiff's counsel objected to the amendment, as changing the nature of the defence, making it inconsistent with and repugnant to the former one; but the court received the amended answer, and the adverse counsel excepted.

On these amended pleadings, the parties were ruled to trial.

The plaintiffs offered parole evidence to show the value of all the slaves born upon the plantation from the slaves

which Erwin sold to Wright, after the 13th of May, 1827, the date of the sale; all of whom were under the age of ten years, for the purpose of charging the defendants in damages for the eviction, by the sale under execution of the United States Bank against Erwin. The introduction of this testimony was objected to by the defendants' counsel on various grounds, and the objections were sustained by the court; to the opinion of which the plaintiffs' counsel excepted.

On receiving an elaborate charge of the judge presiding, the jury returned a verdict of eight hundred dollars for the plaintiffs, and after an unsuccessful attempt to obtain a new trial, the plaintiffs appealed from the judgment confirming the verdict.

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Labaree and *Stacy*, for the plaintiffs, contended, that the amended petition ought to have been allowed by the court. It does not change the issue, or alter the substance of the plaintiffs' demand; but only sets it out more fully, so as to exhibit the whole title on which the plaintiffs rely.

2. The amended answer was improperly admitted, because it changes the entire nature of the defence, from a lease of the premises, to an absolute sale. The two defences set up, are inconsistent with, and repugnant to each other. If they should be allowed at all, the effect must be to destroy one another. It is impossible that they can stand together.

3. Parole evidence was properly admitted to prove the value of the slaves born after the sale, and remaining on the plantation at the time of the eviction, and which were seized and sold by the Bank of the United States, under its judgment and execution. This forms part of the damages suffered by the eviction, and which the defendants are bound to return.

4. The District Court erred in not granting a new trial. The verdict of the jury is clearly contrary to or disregards the evidence, and the judgment should be reversed and the cause remanded.

5. Evidence ought to have been admitted of the increased value of the plantation and slaves, from the time of sale to 1833, the time of eviction, in order to ascertain the extent of

EASTERN DIST. the damages sustained by the eviction, and for which the
March, 1839. defendants are liable, on their warranty. *Louisiana Code,*
BISSELL ET UX. *article 2482.*
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Winchester and Edwards, for the defendants, insisted, that the court below erred, in permitting the plaintiffs to prove the value of the slaves born on the plantation, after the sale of May 13, 1827, from Erwin to Wright, and in charging the jury that the defendants were liable to damages for the eviction of the slaves; as they were not and could not be included in the mortgage from Erwin to the United States Bank, made anterior to the sale to Wright, and were, therefore, illegally sold. The defendants are not responsible for the illegal acts of others.

2. The supplemental petition was correctly rejected, for the amendment changed the substance, and altered the demand set up in the original petition, and evidently changed the nature of the action. It changed the whole nature of the demand, inasmuch as the contract or act of sale of the 12th June, 1824, is to be construed with reference to the old Civil Code, by which the person evicted is entitled to the *increased value* of the property at the time of eviction, over the price of the original sale. Vide 9 *Louisiana Reports*, 554. The provisions of the Louisiana Code, under which the contract of the 27th May, 1827, was made, are different. See *article 2482*.

3. The amended answer was properly received. It only shaped the defence in accordance with the decision of the Supreme Court, which declared the contract under consideration to be a sale, and not a lease. It was still the same contract, but called by a different name, and its effects were variant from that first supposed.

4. The court decided correctly in not allowing the plaintiffs to prove the value of the plantation and slaves, in 1833, at the time of the alleged eviction, in order to recover the increased value, in damages. This would have been to allow for the increased value from the day of sale to that of the eviction, and inflicting on the defendants all the penalties of

the old civil code, which are repealed by the 2482d article of the Louisiana Code. 9 *Louisiana Reports*, 554, *Morris vs. Abat et al.* EASTERN DIST.
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5. The defendants deny that the plaintiffs suffered any eviction in the meaning of the term, or by intendment of law. The evidence shows that Wright bought, knowing of Erwin's mortgage to the bank, and if their property was sold under the mortgage of another; it was their own fault.

BISSELL ET UX.
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Rost, J., delivered the opinion of the court.

This case was already once before this court, and the facts are fully stated in the report of the decision, 10 *Louisiana Reports*, 524. In that decision, the court held, that the contract under which the plaintiffs claimed, bearing date the 13th May, 1827, was a sale, and that the agreement subsequently signed by Wright, was not repugnant to, or inconsistent with it. The court then being of opinion that justice had not been done between the parties, according to the evidence, remanded the case for a new trial. It was tried in the District Court, and judgment having been rendered in favor of the plaintiffs for only a small part of their claim, they have appealed.

Our attention is first drawn to three bills of exception taken during the trial.

1st. To the admission of the amended answer of the defendants, on the ground that it changed the nature of his defence.

2nd. To the refusal to permit the plaintiffs to amend their petition, and to allege and prove a title from Erwin to Wright, similar in form to that of 1827, but bearing date in 1824.

3rd. To the refusal to receive evidence of the increased value of the property at the time of the eviction.

I. The amended answer of the defendants was properly admitted: they had proceeded in the former trial, under the belief that the contract of 1827 was a lease, and not a sale; this court decided that they were in error, and the district judge violated no law in suffering them to shape their defence in accordance with the principles settled by that decision.

An amendment of the answer changing the defence from a contract of lease, to one of sale, will be allowed, when it is in accordance with the principles settled in the case by this court, remanding it for a new trial.

EASTERN DIST. As long as the defendants believed the contract to be a lease,
March, 1839. they could not claim the payment of the price.

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The plaintiff may amend his petition, so as to embrace an act of sale anterior in date to the one sued on; provided it does not change the title, but only furnishes additional evidence of it.

II. The act of sale of 1824, together with that of 1827, and Wright's memorandum in 1828, appear to us to be evidence of one and the same contract, modified in its execution by each of these acts, but, from the beginning, a sale to Wright of the property from which the plaintiffs have been evicted. That act does not change the nature of the plaintiffs' title; it furnishes additional evidence of it, if it was not superseded by that of 1827, and we think it ought to have been admitted by the District Court.

III. The District Court erred in rejecting the evidence offered by the plaintiffs, to prove the increase in value of the property at the time of the eviction. In doing so, it assumed that no part of that increase could be taken into consideration, in assessing damages on a warranty. This is an error into which many members of the bar have fallen, and it arises from some inaccuracies in the printing of the opinion of this court, in the case of *Morris vs. Abat et al.*, 9 *Louisiana Reports*, 522.* The court there held that a *bona fide* vendor

*A literal copy of the opinion of the court, by Judge Martin, in the important case of *Morris vs. Abat et al.*, is here inserted, to correct some mistakes in the printing of it, in the 9th volume of these Reports. This copy is deciphered and carefully made out from the original *autograph* or *hieroglyphic* manuscript, on file in the clerk's office. A *hiatus* or two, occurring in the original, has been supplied by words included between brackets.

REPORTER.

MORRIS VS. ABAT ET AL.

Martin, J., delivered the opinion of the court.

This is a petitory action, in which the land was recovered, and the defendant had judgment against Millaudon, his warrantor, for three thousand dollars, and costs; this sum being that at which the land had been rated in an exchange between those parties.

Millaudon had judgment against Macarty, his vendor, for one thousand five hundred dollars, the price the latter had received. Millaudon and Macarty appealed.

The counsel of the former has contended:

1. That the warrantor has to pay the price, and the damages the vendee has suffered. *Civil Code*, article 2482.
2. That damages consist of the loss sustained, and the profits not made. *Ib.*
3. That a positive statutory provision, alone, can silence the general rule. Macarty resists the claim, on an allegation that Millaudon's conveyance

is not bound to indemnify his vendee for *profits not made*, and that to make him answerable for profits not made, and for the augmentation of the value of the thing sold, at the time of the eviction, beyond the price of the original sale, would be to restore and carry into effect the *entire* provisions of that article of the code of 1808, which the legislature intended to suppress and repeal. But the court never had a doubt that the damages intended by the law, in cases of eviction, are something over and above the original price, nor did it mean to say that such increase in the value as the parties could reasonably have anticipated at the time of the contract, was a *profit not made*, when the eviction took place. It is, on the contrary, a *profit made* by the buyer, *propter rem ipsam*, and ought in all cases to form a part of the damages. The article of the old code referred to in the former decision, provided, that the increase of value was in all cases to be paid to the person evicted; and it was generally believed, justly or not we do not pretend to say, that there was no exception to that rule, however enormous the increase might be, and from whatever causes it arose. Such is the inter-

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A *bona fide* vendor, on eviction of his vendee, since the adoption of the Louisiana Code, is not bound to indemnify the latter for profits not made, or restore absolutely the increased value of the thing sold, above the price of the original sale.

to the defendant is simulated, and was made after he had notice that the present suit was intended, with a view of claiming heavy damages.

The district judge was of opinion that a *bona fide* vendor is not bound to indemnify for profits not made.

He did not examine the allegation of simulation. We are, therefore, called upon to test the correctness of his decision on the legal extent of the vendor's liability, on an eviction.

It is not denied that, under the code of 1808, this liability extended to an indemnification of the loss which resulted from the profits arising from the difference of value of the thing sold, by events to which the vendee had not contributed; the article 57, page 354, providing, that if at the time of the eviction the thing sold has risen in value, even without the buyer's having contributed thereto, the seller is bound to pay the amount of this augmentation of value, beyond the price of the sale.

The compilers of the new code recommended the suppression of this article, as containing a provision evidently dangerous, which might cause the ruin of a vendor in good faith, in a country in which the fluctuation of value [is great.]

This article was accordingly suppressed, and the vendor's liability restricted by article 2432:

1. To the restitution of the price.

EASTERN DIST. pretation given by Toullier to a similar provision in the
March, 1839. French code. *Toullier on Obligations.*

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But in cases of
 eviction, such
 increased value
 of the thing sold,
 above the price
 of the original
 sale, as the parties
 might have
 reasonably anticipated
 at the time of contract
 should be considered
 as profits made by the
 buyer, and ought
 in all cases to
 form a part of
 the damages, for
 which the vendor
 is liable on
 his warranty.

The juriconsults who prepared the code of 1825 have adopted Toullier's opinion, and the article was suppressed at their recommendation, on account of the ruinous consequences to which it might lead.

The law now stands here as it did in France before the adoption of the code, and there the increased value of the property invariably formed part of the damages assessed on a warranty, but such increase only as the parties could have in contemplation at the time of the contract, ought to be taken into account, and the vendor should not be made to pay the increase which results from unforeseen events, or from accidental or transient causes. *Dumoulin, de eo quod, interest, No. 57 and following. Pothier on Obligations, No. 164. Ibid., Vente, No. 133. 6 Toullier on Obligations, 285. Troplong de la Vente, No. 506.*

Under these circumstances, it is necessary to remand the case.

2. To that of the fruits or revenues, if the party has been obliged to return them.

3. That of costs of suit.

4. In fine, all the damages which the party has suffered, besides the price which he has paid.

To say that the word *damages*, in the above article, includes, as "*a loss of profits*," the augmentation of the value of the thing sold, above the price of sale, would be to thwart, rather than carry into effect, the express intentions of the legislature.

It would be to reinstate the whole of the former code, suppressed on the recommendation of the compilers of the new [one.] and since formally repealed.

When an avowedly [implied] provision becomes an express or textual one, the repeal of the latter must carry with it that of the former, as an acknowledged principle of law; otherwise, the repeal of the other would be vain and idle.

The construction adopted by the district judge, appears to us perfectly correct. Under this impression, we conclude that neither of the appellants has any good ground of complaint against the decision of the District Court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and annulled, and the case remanded for a new trial, with directions to the district judge to allow the plaintiffs to file their amended petition; to prove and give in evidence the document annexed thereto, and to make proof of the increased value of the property from which they have been evicted.

It is further ordered and adjudged, that the defendant and appellee pay the costs of this appeal.

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VS.
DASHIELL.
The defendant on eviction, will be allowed to produce evidence of the increased value of the property at the time of eviction, above the original price at which he purchased.

=====

LESASSIER VS. DASHIELL.*

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

In sales *per aversionem*, the purchaser cannot claim diminution of price for a deficiency in measurement; but if he has been led into error by the fraudulent concealment of the vendor, as to the real quantity, he is not without remedy, and will be allowed to produce evidence of fraud and concealment under the proper allegations.

Good faith is required in sales *per aversionem*, as much as in any other kind of contracts, and when fraud and concealment is alleged in the pleadings, the court should allow the inquiry to be gone into.

So, the purchaser was permitted to introduce evidence to show that the vendor knew at the time of the sale, which was *per aversionem*, that the tract of land described in the act of sale contained less than the quantity mentioned.

This is an action to recover two sums of money, one of one thousand eight hundred dollars, and the other, three thousand dollars, with interest, which remain due on the price of a tract of land, or plantation and slaves, sold by the

* This case was decided at last January Term, but suspended until now by an application for a re-hearing.

EASTERN DIST. plaintiff to the defendant, by public act, bearing date 8th of
March, 1839. March, 1836.

LESASSIER
VS.
DASHIELL.

The defendant on being cited presented his petition, alleging that he was a citizen of the state of Mississippi, and prayed that this suit be removed to the United States District Court for the Eastern District of Louisiana. The prayer was refused, and the application of the defendant overruled by the court.

He then filed an answer to the merits, and prayed for further time to answer more fully. He averred, that since the commencement of the suit, he had been informed that a grant or transfer was made to one Doctor Guitteau, affecting materially the nature and extent of this defendant's title to the land he had purchased, by giving to the said Doctor Guitteau privileges and servitudes, which, if he had known, he would not have purchased. He expressly charges Lesassier, with having fraudulently concealed the existence of this act of transfer to Doctor Guitteau, and with having made fraudulent representations in relation to it. He prays *oyer* of this act of transfer, and that Doctor Guitteau be required to bring it into court. He further avers the fraudulent concealment of other mortgages and incumbrances existing on the premises at the time he purchased; and concludes with a prayer for further time to answer more fully the allegations in the petition.

On the fourth day after filing the above, the defendant put in his answer in full, in which he pleaded a general denial to all the allegations not specially admitted. He then avers that the real measure of the plantation as purchased by him, is short of the quantity expressed in the contract of sale, more than one-twentieth part. He also sets out various vices in the thing sold, and avers that the plantation was encumbered with mortgages and servitudes, which were unknown to him at the time of sale, and of which the plaintiff made no declaration, but had he known them he would not have purchased. He then prays that the contract of sale be cancelled, the money he has paid returned to him, and that he be allowed damages for the injuries he has sustained by said sale and purchase.

At the following term of the District Court, the defendant, EASTERN DIST. March, 1839. by leave of court, filed an amended answer, in which he expressly averred that the plaintiff knew at the time of sale, that the titles to this property had been rejected by the counsel of the Citizens' Bank, and that all the incumbrances and vices existing on it, were well known to him, all of which he concealed; that this concealment and suppression of facts was a fraud upon this defendant, which gives him a right to have the sale rescinded. He then renews his prayer for the rescission of the sale, and that the sums of money he has paid be refunded, together with damages.

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The plaintiff's counsel objected and excepted to the amended answer. 1st. Because it altered the nature and substance of the defence set up in the original one, by pleading fraud and concealment. 2d. Surprise. 3d. The plea of fraud and concealment is barred by prescription.

The plaintiff amended and filed his plea of prescription to the defendant's claim for damages.

There was also a suit of intervention, not necessary to notice.

Upon these pleadings and issues, the parties went to trial. The defendant offered witnesses to prove that the plaintiff knew at the time of sale, which he concealed from the purchaser, that the quantity of land was *less* than that expressed in the act of sale; "that the tract known as the double concession, did not contain four hundred arpents, but a *less* quantity, and *only ninety-three acres*." This testimony was objected to on the ground that it was a sale *per aversionem*, and the purchaser had no right to a diminution of price or a rescission of the sale for a diminution in quantity, as no particular quantity of land was expressed, except what was contained within the boundaries described in the act of sale. The objection was sustained by the court, and the defendant's counsel took his bill of exceptions.

The act of sale described the land as "a second concession, supposed to contain *four hundred superficial arpents, more or less*, bounded above by lands of Isidore Blanchard, deceased, and below by land of Lesassier," &c.

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There were other bills of exception in the record not now noticed, as the cause was sent back on the rejection of defendant's testimony.

There was final judgment for the plaintiff, from which the defendant appealed.

Winchester and Ives, for the plaintiffs.

1. The court below erred in allowing the defendant's answer to be filed. It altered the nature and substance of the defence set up in the original answer, by pleading fraud, and making that plea the basis of a new claim for damages on matters independent of the original contract. *Code of Practice*, 420. 8 *Martin*, N. S., 412.

2. There was no fraud or concealment. A distinct clause in the act of sale supposes a possible deficiency in the back concession tract, and provides for it. By reference to this act of sale, it will be seen, the defendant was informed of the character and description of the titles under which Lesassier held the property, and by which he sold and expressly mentioned that both tracts (double concessions) *were sold agreeably to the antecedent titles and conveyances made by the vendor*. Here the vendee was informed and put on his guard as to the titles.

3. It was further contended, that in fact this was a sale *per aversionem*, by specific boundaries, and the vendee is obliged to take the tract more or less by the boundaries, without being entitled to a diminution of price or rescission of the sale, for a deficiency of measurement.

Lobdell and Sterling, for the defendant and appellant.

1. The defendant was authorized by the pleadings to claim a diminution in the price or rescission of the sale, for deficiency in measurement; for fraud and concealment was alleged. The diminution in quantity is clearly shown by the testimony of the surveyor, and witnesses were offered to prove fraud and concealment on the part of the plaintiff and vendor.

2. There were various defects and vices in the titles,

which prevented the vendee from obtaining stock on it in the Citizens' Bank, or getting a loan; in fact, it was rendered useless by the concealed incumbrances and servitudes existing on it, and this too, in the knowledge of the plaintiff, who failed to disclose them at the time of making the sale. The defendant is, therefore, entitled to a rescission of the sale with restitution of so much of the price as has been paid, with damages for the bad faith of the plaintiff.

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Bullard, J., delivered the opinion of the court.

This is an action to recover of the defendant a part of the price of a tract of land and slaves. The defendant alleged a deficiency of the land, together with various other grounds of defence, and among others, fraud and concealment, and that the vendor knew that the tract of land contained much less than the quantity stated in the conveyance.

In the progress of the trial, the defendant offered witnesses to prove that the vendor knew before, and at the time of the sale, that the tract of land known as the double concession, did not contain four hundred arpents, but a less quantity, to wit, ninety-three arpents and a fraction, but that before and at the time of the sale, he assured the defendant that it contained four hundred arpents or upwards. This evidence was rejected by the court, on the ground that the sale was *per aversionem*, and that it made no difference whether the vendor knew or not that there was a less quantity, because in sales of that kind, the purchaser can claim nothing for a diminution. A bill of exceptions was taken, to which our attention has been drawn.

It appears to us the court erred. Admitting that the sale was *per aversionem*, and that, consequently, the purchaser has no right to claim for any diminution in the measurement *merely*; yet it does not appear to us logical to conclude that if he was led into error by the fraudulent concealment of the vendor, as to the real quantity contained within the specific boundaries, he is without remedy. Good faith is required in sales of this description, as much as in any other contract, and it was proper under the pleadings of this case to go into

In sales *per aversionem* the purchaser cannot claim diminution of price for a deficiency in measurement, but if he has been led into error by the fraudulent concealment of the vendor, as to the real quantity, he is not without a remedy, and will be allowed to produce evidence of fraud and concealment under the proper allegations.

Good faith is required in sales *per aversionem*, as much as in any other kind of contracts, and when fraud and concealment is alleged in the

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pleadings, the
court should al-
low the inquiry
to be gone into.

that inquiry. The act of sale describes that part of the land commonly called the double concession, as "supposed to contain about four hundred superficial arpents;" now if it be true that there were but ninety-seven acres, instead of four hundred arpents, in this double concession, to the knowledge of Lesassier, the latter in our opinion cannot shelter himself behind the principle that the sale was one, *per aversionem*, and that he was not liable to make up any deficiency.

So, the purchaser was permitted to introduce evidence, to show that the vendor knew at the time of the sale, which was *per aversionem*, that the tract of land described in the act of sale, contained less than was mentioned.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and it is further ordered, that the case be remanded for a new trial, with directions to the judge not to decline to receive the evidence offered to prove that the vendor knew at the time of the sale, and before that the double concession, described in the act of sale, contained less than four hundred arpents; and that the plaintiffs pay the costs of the appeal.

BROWDER'S CURATOR vs. BROWDER'S HEIRS, ETC.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF EAST BATON ROUGE.

Where a judgment was rendered at the instance and on the prayer of the party, he cannot be allowed to open it after it is final, and have errors of calculation, alleged to exist to his prejudice, corrected.

In this case the curator of F. A. Browder's estate, presented two accounts and tableaux of distribution, which were at his instance and prayer, with a slight alteration to which he consented, homologated and confirmed.

After both these judgments were final, the curator presented his petition to the judge of probates, in which he states that he has now been able more critically to examine

the different judgments homologating the accounts heretofore filed by him and the former curator, (J. Linton,) and finds there has been material errors of calculation in his last tableau of distribution, greatly to his prejudice, and which he alleges the court has the power to correct.

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He then sets out the various errors of calculation that are supposed to exist in the former tableaux, and appends to his petition a revised and amended tableau, and prays that after due notice given, it be homologated, and that he be authorized to pay the claimants, creditors and heirs, in conformity therewith; and, finally, that he be discharged from his curatorship and his bond cancelled.

The attorneys of the absent heirs and others, opposed the petition and prayer of the curator.

The judge of probates was of opinion he had no power to allow the application; the former judgment being final and in full force. Judgment was rendered against the curator, and he appealed.

J. Seghers, for the appellant, insisted that the corrections prayed for ought to be made. That if they were not, it would do great injustice to the petitioner. He would be required to pay something like the sum of twenty thousand dollars for errors committed by his counsel, &c.

A. N. and R. N. Ogden, contra.

Eustis, J., delivered the opinion of the court.

On the 12th of May, 1836, the curator filed an account of his administration, and a provisional tableau of distribution, which was homologated by a decree of the court on the 20th of June ensuing.

On the 30th of November, 1837, he filed another tableau of distribution, accompanying a petition, in which he alleged that he had collected and realized the remaining proceeds of the property of the succession; that by the tableau he distributes the funds among the creditors and the heirs, according to their respective rights; he prays that he be authorized

EASTERN DIST. to pay the same; that after due notice to all parties and proceedings had, the tableau of distribution may be homologated, and he may be discharged from his curatorship and his bonds be cancelled.

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The homologation of this tableau was opposed by Thomas G. Morgan, Esq., who claimed to be placed therein as a privileged creditor, for the sum of two hundred and fifty dollars. The curator replied, that he had been informed that Mr. Morgan had rendered the services for which he claimed a compensation, and prayed the court to fix such sum as might be due him, and to amend the tableau accordingly; which was done by a decree of the court, dated the 20th of December, 1837. An opposition was also filed by Mrs. Linton, and on the 22d of February, of that year, on the day assigned for the trial of the case, the opposition was dismissed, the tableau, as amended, was homologated, and the curator authorized to pay the creditors, in conformity thereto.

On the 19th of April, 1838, the curator represented to the court, by petition, that there were several material errors of calculation in his last tableau of distribution to his, the petitioner's prejudice, which he prays may be corrected, and for which he files an amended tableau, which he prays may, after due notice and proceedings had, be homologated and made the judgment of the court.

On this application, the court determined that the former judgment being in force, the relief prayed for could not be granted, and rendered judgment accordingly. From both judgments the curator has appealed.

We concur with the judge of the Court of Probates, in his decision in the application of the curator for relief against the judgment of homologation, of February 22d, 1837.

Where a judgment was rendered at the instance and on the prayer of the party, he cannot be allowed to open it, after it is final, and have errors of calculation alleged to exist to his prejudice, corrected.

That judgment was rendered on his own prayer, at his own instance, and with the exception of the claim allowed to Mr. Morgan, is in every respect according to his own allegations. We have nothing before us on which we can reverse that part of the judgment founded on Mr. Morgan's claim, (admitting that we have jurisdiction of it,) particularly when we take into consideration the answer of the curator,

to which we have before referred. Presented to us, as this case is, we cannot at the request of a party, reverse a judgment rendered in his favor on his own petition. The articles 606, *et seq.*, of the *Code of Practice*, provide for a remedy against judgments in all cases where relief ought to be afforded. There is nothing in the record from which we can pronounce the nullity of these judgments.

The judgments of the Court of Probates, appealed from, are, therefore, affirmed with costs in both cases.

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BERNARD.

13L 159
40 749
13L 159
52 1604

RIVAS'S HEIRS vs. BERNARD.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE PARISH OF EAST BATON ROUGE, THE JUDGE THEREOF PRESIDING.

By the article 339, of the Louisiana Code, the adjudication of property held in common, between the surviving parent and their minor children, is *alone authorized*. The separate property of the deceased parent descends to his children, and can only be alienated in the manner prescribed by law, for the sale of minor's property.

Where the ratification of a sale, or of certain proceedings, is relied on, the burden of proof is on the party alleging it, and facts must be established from which the *ratification necessarily results*, when there is no positive proof.

To give validity to a contract which is merely voidable, it must be deliberately, and upon examination, confirmed by the party, to be binding on him.

This is a petitory action, in which Francis and Zenon Rivas, seek to recover two undivided thirds of a plantation or tract of land, having twelve or thirteen arpents front on the Mississippi, with the usual depth, and claimed by the defendant.

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The plaintiffs allege that said land was inherited by their father from his ancestor, and was his separate property, and that at his death he left only three heirs, (the petitioners and Virginie Rivas,) all minors, and that without their consent and in contravention of the forms of law required in such cases, the tract of land in question, has been illegally sold and taken possession of by the defendant. They pray for judgment, declaring them to be the lawful owners of two-thirds thereof, and for damages.

1. The defendant pleaded a general denial.

2. He avers that he is the lawful owner of the land sued for, having acquired the same at a sale made by the syndic of the estate of Marie Rivas, an insolvent debtor. That said sale was made in pursuance of a competent judicial order to that effect, and that respondent paid the price at which it was adjudicated, to the syndic. They aver that the title so vested in them, can only be annulled or contested in a regular action of nullity, to which the heirs and creditors of Marie Rivas should be parties.

3. He avers that the father of petitioners left his estate heavily encumbered with debts; that after his decease his surviving widow caused the whole of the property belonging to the community to be adjudicated to her, and that among the community property so adjudicated, was the tract of land now claimed. That subsequently, finding herself unable to pay the community debts, or her own, she made a surrender of her property for the benefit of her creditors; and that the land claimed was sold, and the proceeds of the sale appropriated principally to the payment of the debts contracted by Francis Rivas, the father of plaintiffs.

4. That the property surrendered by Marie Rivas, the mother of plaintiffs, sold for more than sufficient to pay all her debts, and plaintiffs, as her heirs, have received from the syndic their portion of the overplus, and given him an acquittance therefor, and thereby ratified all the proceedings in the surrender, and confirmed the title of defendant, they being at the time of full age.

5. That when the tableau of distribution was filed, the

plaintiffs were of full age, and appeared in court and made opposition on various grounds to the tableau of distribution, but did not set up title to the land now claimed, but on the contrary admitted it to have been the common property of their parents, and claimed as privileged creditors to be paid a large sum out of the proceeds of said sale.

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6. He avers that after the surrender of Marie Rivas, she acquired some property, and that on her decease, the plaintiffs, who were then majors, took possession of her property and divided it between themselves and their sister, Virginie Rivas, without pursuing the forms of law, and that, thereby, they have rendered themselves liable as heirs, pure and simple, of their mother, and are estopped from asserting their present claim.

7. He demands that the heirs of Marie Rivas, and her creditors, be cited in warranty, &c.

Upon these pleadings and issues, the cause was tried.

It appeared in evidence that Francis Rivas, the ancestor of the plaintiffs, received this land partly by inheritance and partly by purchase from his co-heirs after his marriage; that the price he was to allow for it, (four thousand dollars,) formed part of the succession to be divided between the heirs.

The plaintiffs' ancestor died in possession of this property, which was put in his inventory as part of his estate, the 3d August, 1829. His widow, Marie Rivas, in pursuance of the advice of a family meeting, and an order of the Probate Court thereon, had all the property in the inventory of her deceased husband, adjudicated to her at its appraised value, the 23d November, 1829. She remained in possession under this adjudication until the 7th July, 1831, when she made a surrender of all her property to her creditors, including the tract of land in question, who appointed John Buhler, Esq., sheriff of the parish of East Baton Rouge, syndic. This property, with other effects, was sold by the syndic after the necessary formalities, and the land purchased by the defendant Bernard, for the sum and price of nine thousand one hundred dollars. The syndic filed his tableau of distribution, in January, 1835, and the plaintiffs, being then both of age,

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made opposition, claiming to be creditors for a larger amount than was recognized by the syndic. These oppositions were dismissed, the parties failing to appear and prosecute them, and on the 3d of July, 1835, the tableau of distribution was homologated. The opponents made an unsuccessful attempt to have their opposition reinstated, but no appeal was ever taken by them. They received from the syndic the sums allowed them on the tableau.

The defendant's counsel relied on these acts of the plaintiffs, as a full and complete ratification of the sale and adjudication of this property to their mother.

It appears in evidence that the syndic of Madame Rivas's creditors, filed his tableau of distribution the 14th January, 1835, in which he puts down the proceeds of the sale of her personal property at six hundred and fifty-eight dollars; slaves, at six thousand six hundred and nine dollars; land to Neilson, seven hundred and fifty dollars; do. to Arnous, one thousand dollars; do. to J. Bernard, (defendant,) nine thousand one hundred dollars; a lot in Baton Rouge, to Montegut, at three hundred dollars; in all, eighteen thousand four hundred and seventeen dollars. Among other creditors, he placed thereon, "Francis, Zenon and Virginie Rivas, heirs of Marie Rivas," (as creditors,) for four thousand seven hundred and sixteen dollars and sixty-three cents.

On the 21st January, these heirs (Francis and Zenon Rivas, being of full age,) filed their opposition to the tableau, in which they allege they are the lawful heirs of Francis Rivas, deceased, whose property, according to the inventory of his estate, amounted to twenty-two thousand six hundred and forty-nine dollars; and that, during the existence of the community, he received from his father's estate the sum of eleven thousand five hundred and seventy-nine dollars, and the acquests and gains were only three thousand and eighty dollars; one half of which belonged to these opponents as his heirs. That the said Marie Allain, (widow Rivas,) remained in possession of the undivided property of her and her late husband, until she was unlawfully divested of it, by surrender to Buhler, as syndic, &c. That their said mother took

possession of their share in their father's estate and never accounted for it, in consequence of which, they allege, they are the privileged creditors of their mother for the share inherited from their father, to wit: the sum of eleven thousand five hundred and seventy-nine dollars; and for two thousand dollars brought to the community by their mother, (Madame Rivas,) as her separate property; and further, they claim one half of the balance as common property, being the sole heirs of their father.

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The opponents then pleaded exceptions to various parts of the proceedings of the creditors and syndic, receiving and selling the property so surrendered by their mother, and set up several vices and errors in the formalities of the proceedings: finally, they allege that the syndic improperly and wrongfully placed them on the tableau, as heirs of Madame Rivas, when they never had assumed that quality, and that instead of being placed on the tableau as creditors for four thousand seven hundred and sixteen dollars and sixty-three cents, they ought to have been entered as privileged creditors of their father's estate, in the sum of thirteen thousand one hundred and nineteen dollars, and not as heirs of their mother's insolvent estate. They reserve all their rights, and in opposing the homologation of the tableau, pray that it be so amended as to conform to and allow them their claims as set up by them.

When this opposition was called up for trial, Zenon Rivas was dead, and no one appearing for them, the opposition was dismissed.

Buhler, who was syndic of the creditors of Marie Rivas, was called as a witness for the defendant. He states he paid F. Rivas the full amount due to him, out of the proceeds of his mother's estate, as placed on the tableau. He proved the signature of F. Rivas to a paper offered in evidence, to show he had made himself responsible for the payment of one of the debts placed on the tableau. Objected to, because F. Rivas was a minor at the time. Admitted, the objection going to the effect and not to the competency. Witness said he had no money of F. Rivas, except what was allowed him

EASTERN DIST. on the tableau of distribution. Rivas called on him for the money.
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Witness further states that Z. Rivas paid him, as syndic, the last note due by Arnous, for the price of property purchased by him at the sale of Mrs. Rivas's estate. Witness was not indebted to Z. Rivas in any other manner, than as stated on the tableau. Witness proved signature of F. Rivas to a paper, offered to prove his acceptance of the amount appearing to be due him on the tableau, and to show his acquiescence in the proceedings, &c. Objected to, because the paper was written while F. Rivas was a minor. Admitted, the objection going to the effect of the evidence only.

The defendant offered in evidence the record of the suit of *Marie Rivas vs. Her Creditors*, to show how much of the proceeds of the sale of the property surrendered was appropriated to the payment of the community debts, and it appearing the vouchers were not endorsed, as having been filed by the clerk, parole evidence of J. Buhler, syndic, was offered to make their proof: objected to and admitted, and a bill of exceptions taken.

The plaintiffs then moved to strike out all the evidence of Buhler, because it appeared that at the time of the death of Rivas, the father, the plaintiffs were minors, and that Buhler illegally and wrongfully took possession and administered their estate and is liable to them. The motion was overruled and the plaintiffs' counsel excepted.

From the foregoing evidence, the district judge was of opinion the plaintiffs were bound, by the proceedings had in the surrender, sale and distribution of the proceeds of the property surrendered, and that they could not be permitted to attack these proceedings collaterally. That not having appealed from them, or instituted an action of nullity to set them aside, they are precluded from a recovery in the present suit.

The district judge was also of opinion the evidence showed that the plaintiffs had rendered themselves liable, as heirs pure and simple of their mother, by taking possession and appropriating to their own use the property of which she died

possessed. Judgment was, therefore, rendered for the defendant, from which the plaintiffs appealed.

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Elam and Barton, for the plaintiffs.

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I. The inventory establishes that this property formed part of the estate of plaintiffs' grand-father. He died intestate, leaving four children. Hence the father inherited an undivided fourth. He entered into an agreement with his co-heirs, by which he was to acquire the remaining three-fourths, at the price of three thousand dollars, payable in four equal annual instalments, &c.

Before the last instalment of the price fell due, to wit, on the 30th of December, 1817, the parties had a conventional liquidation and partition of the estate. Each heir was entitled to eleven thousand five hundred and seventy-nine dollars forty-one and three-fourth cents; and as part of the share of plaintiffs' father, we find this property allotted to him at the price of four thousand dollars. From this it is evident, that the plaintiffs' father inherited one-fourth of this property, and paid for the remaining three-fourths out of the proceeds of his share of the inheritance. This constitutes it separate estate under our laws.

II. The adjudication to Madame Rivas was absolutely null, and did not pass the land.

1st. Because it was separate property. The minors did not hold it in common with her, and none but property so holden can be adjudicated to the father or mother of minors. *Louisiana Code, article 338.* But had it been holden in common, the adjudication is void, because the same article requires that there shall be an "estimation by experts" of the property, after the family meeting have advised the adjudication; and here the property was taken at the original appraisement.

2d. As a sale it was void. The adjudication was a sale, and nothing else. It contains all the elements and properties of a sale. There is the thing parted with, and acquired, its price and the consent of one party, and an essay towards those legal formalities, which (fully and exactly complied

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with) supply the consent of the others. If a sale then, why was it void? because the tutrix purchased of her pupils, which the law forbids. *Louisiana Code*, 327. But it was void for want of other formalities.

III. The insolvent proceedings as to the land were void, and did not pass it to the purchaser.

1. Because Marie Rivas could not make a cession of property which did not belong to her.

2. The plaintiffs, being minors at the time of the cession and sale, and the land being exclusively theirs, no alienation thereof could be legal without the ministration of the Probate Court; the District Court being wholly without jurisdiction.

3. The plaintiffs were not placed on the bilan of Marie Rivas, nor in any wise represented in the *concurso*, and hence are not bound thereby. *Bainbridge vs. Clay*, 3 *Martin, N. S.*, 262. *Thomas et al. vs. Breedlove et al.*, 6 *Louisiana Reports*, 575. As to citation of creditors, see 2 *Moreau's Digest*, 426, section 8. *Louisiana Code*, 3054. The syndics and creditors were bound to have the minors legally represented, under the penalty of intermeddling. *Louisiana Code*, 3283. 11 *Louisiana Reports*, 4. *Ibid.*, 409.

4. The property was not sold agreeable to law. There was no *procès verbal* of the sale. The deed being *ex parte* as to us, the recitals thereof can have no effect against us; and we are not otherwise apprised by the proof of there having been a public sale, but by a recital to that effect in the deed, afterwards made. None but a public auctioneer could have sold the property. There being no evidence to establish that this was a public sale, made in the manner required by law, it must be considered as a private sale. Such a sale could not be made of the property embraced in an insolvent's cession. See Act of 1826, 2 *Moreau's Dig.*, 437, sec. 3. Again, these irregularities of the syndic, constituted him a tutor, in his own wrong; and as tutor, he is expressly forbid to make a private sale of his ward's property; such a sale is not a relative but an absolute nullity. *Fletcher et al. vs. Cavalier*, 4 *Louisiana Reports*, 269. The plaintiffs not being divested of title by

these proceedings, the next inquiry is, how far their rights were affected by the homologation of the syndic's tableau of distribution. EASTERN DIST.
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IV. The judgment homologating the tableau of distribution is not *res judicata*, as to us. RIVAS'S HEIRS
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It is true the plaintiffs filed their opposition to this tableau, but it is not true that the merits thereof were ever discussed, considered, or decided upon. The counsel has strangely confounded the facts, by not giving them their proper order of precedence, as they are found upon the record. The judgment declares, that opponent's counsel being dead, and they being called, and not present to prosecute their opposition, that the same be *dismissed*, and it *then* proceeds to homologate the tableau. Now, it is clear from this, that the same document comprises two judgments, entirely distinct and several in their natures: 1st. A judgment of dismissal. 2d. A judgment of homologation; and by force of that dismissal, the plaintiffs ceased to be parties to the tableau *before* the judgment homologating it was rendered. Hence we say that judgment is not *res judicata*, because,

1st. *It was a judgment of non-suit.* A judgment of *dismissal* is nothing more than a judgment of *non-suit*. The terms are strictly synonymous when applied to coercive non-suits by the court, contra-distinguished from voluntary non-suits, by a party, and none of these are *res judicata*, and the party may bring his action anew on paying costs, etc. *Code of Practice*, articles 491, 492, 536; 1 *Martin, N. S.*, 165; 6 *ibid.*, 331; 7 *ibid.*, 365; 2 *Louisiana Reports*, 429.

2nd. We were not parties to judgment of homologation, nor placed upon the bilan. A judgment can never have the effect of *res judicata* against persons not parties to it. Even where a person has claims in different capacities against an insolvent estate, and is regularly cited as to one, and votes for syndic, the judgment of homologation is no bar to his other claim, provided he receives nothing under the tableau. 6 *Louisiana Reports*, 576. When a party's claim is dismissed, he is no longer a party to the suit. 3 *Louisiana Reports*, 514; 4 *ibid.*, 324.

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3rd. The demand is not the same, nor between the same parties, in the same quality. It has been strenuously urged, that this judgment could only be assailed by appeal, or action of nullity. This has been conclusively replied to already, in showing we were not parties to it, that it is not for the same cause, etc. We have another answer fully as complete. It is a settled principle of our jurisprudence, that wherever an action of nullity would lie, to annul a judgment, or a contract, etc., the same party may oppose the enforcement of either, by way of exception. Hence, the *exception of nullity*, opposed to such judgment or contract, etc., operates to the same extent and with the like result, as would the *action of nullity*, brought for their dissolution. *Code of Practice*, article 20 ; *Louisiana Code*, articles 1875, 1876, 2042 ; 1 *Martin, N. S.*, 468 ; 3 *ibid.*, 695 ; 2 *Louisiana Reports*, 39 ; 3 *ibid.*, 245.

If, then, this judgment forms no bar to our recovery, the plaintiffs must recover, unless they have ratified the sale, and we maintain,

V. *There has been no ratification :—*

It is alleged, 1st. That the plaintiffs' opposition to the tableau, and claim of proceeds of sale, ratified it.

We answer, that the language of the opposition is that of the counsel who filed it, and he not being *attorney in fact*, it cannot bind the parties as a *judicial confession*. *Louisiana Code*, article 2270.

2nd. If receiveable at all, it cannot be divided, against us ; and it denounced, as radical and absolute nullities, the whole proceedings against us.

3rd. The dismissal of the opposition placed all its admissions and averments *dehors* judicial cognizance.

It is alleged, 2nd., That the plaintiffs, by taking possession of their mother's estate at her death, without the authority of justice, made them her heirs, pure and simple, and bound them to warrant all her acts.

We answer, the whole of her estimated property was seventy-eight dollars ; that is, twenty-six dollars to each heir, and comes within the principle of *de minimis non curat lex* ; an amount not equal to the funeral expenses, which the

law permits, without construing it into an acceptance of the succession. See *Louisiana Code, article 995*; 3 *Louisiana Reports*, 549. EASTERN DIST.
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It is alleged, 3dly, and lastly, That the plaintiffs have ratified the sale of the land, by receiving the price thereof.

The father of plaintiffs, during his marriage, inherited property to the value of eleven thousand dollars. This includes the land in controversy, valued at that day at four thousand dollars. At his death, his heirs became privileged creditors upon his estate to the amount of the inheritance.

The aggregate of the syndic's sale amounted to eighteen thousand dollars, of which the land in controversy brought nine thousand dollars. The community debts, as exhibited upon the bilan of Marie Rivas, amounted to six thousand dollars. It results, that the heirs were entitled to three thousand dollars of the proceeds of the sale, independent wholly of the price of the land, nine thousand dollars.

The only amount shown by the record to have been received by Zenon Rivas, was one thousand three hundred dollars, and this was some two years *before the tableau was filed*. The only *written* evidence, as to the amount Francis Rivas has received, shows two hundred and fifty dollars. There is no evidence whatever that either of them received any thing *after* the homologation of the tableau; nor do the receipts in any wise connect or identify the acknowledgment of payment therein expressed, with the price of this particular property.

It having been made manifest that the heirs were not divested of title, by the adjudication to Marie Rivas, nor by her *cessio bonorum*, nor the sale of the syndic, it follows, that Bernard is without title, unless those receipts, (*which do not mention the land*,) coupled with the oral declarations of the syndic, that he has paid other moneys to F. Rivas, can confer a title! That syndic, too, having brought upon himself the penalties of an *intermeddler, a tutor in his own wrong*, thereby became incompetent, from interest, to prop up even that frail miniment of title! No case with us has gone to this length; it is altogether without precedent.

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The cases cited from 10 *Martin*, 734 ; 6 *Louisiana Reports*, 601 ; 7 *ibid.*, 34 ; 5 *ibid.*, 520 ; 9 *ibid.*, 291, 293 ; are all clearly distinguishable. Most of them were ratifications by authentic acts, and the others by explicit recognitions.

What constitutes an act of confirmation, or a voluntary execution of an obligation, etc., is explicitly set forth in our code, to this extent—that the former is valid only when it contains *within it* the substance of the obligation confirmed ; and the latter, when it shall be executed *in due form*. *Louisiana Code*, articles 2251–2 ; also, articles 2255, 2214, 2215.

The adjudications elsewhere are fully accordant. They establish that no act of ratification can be opposed to a party, which was not clearly designed as such by the party making it ; nor then, unless it appears that he was fully apprised of his rights, and especially of his right to be relieved from the act claimed to be ratified. See *Newland's Equity Contracts*, first American edition, from page 496 to 502 ; *ibid.*, 435 to 444 ; 2 *Vernon*, 121 ; 1 *Wilson*, 320 ; 3 *Pierre Williams*, 292, and notes ; 3 *Brown's Chancery Cases*, 117 ; 2 *Vesey, jr.*, 199 ; 2 *Schoales and Lefroy*, 48 ; 1 *Ball and Beatty*, 330 ; 11 *Sergeant and Rawle*, 305 ; 1 *Story's Equity Jurisprudence*, 303, chapter 7, section 307 ; *ibid.*, 338, chapter 7, section 345.

A. N. and *R. N. Ogden*, for the defendant, contended, that the original title to the land in controversy was derived by purchase of F. Rivas, the ancestor of the plaintiffs, from his co-heirs, for the sum of four thousand dollars. This acquisition was made during the marriage, and three-fourths of it at least was community property ; the other fourth being his share, in the inheritance with his co-heirs of their deceased ancestor.

2. On the death of F. Rivas, the adjudication of this property to his surviving widow, at the estimative value and in pursuance of the advice of a family meeting, vested in her a good and valid title. But if there were any irregularities in the proceedings, they could only be taken advantage of, or attacked by a direct action of nullity. 7 *Martin, N. S.*, 180. 7 *Louisiana Reports*, 17. 10 *Ibid.*, 264.

3. It also appears from the evidence, that this, with other property, was surrendered by Madame Rivas to pay the debts of the community, which the plaintiff's ancestor, her late husband, had contracted as the head of the community, and was bound to pay. It is shown too, that the plaintiffs, as heirs of their father and mother, (for she died soon after the surrender,) appeared in their capacity of heirs, and claimed to be privileged creditors on the tableau presented by the syndic. They cannot now recover the property; on the contrary, they are bound to warrant the title to the purchaser. 6 *Louisiana Reports*, 601.

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4. The plaintiffs having received after they became of age, the balance of the price of this very property, allowed to them on the tableau of distribution, have ratified the sale of the syndic, and cannot now be allowed to attack the sale and title. The decisions of this court and authorities, are express on this point. In the case of *Groux et al. f. p. c. vs. Abat's Executors*, this court held, "that where the price of minors' property has been received by their tutor and placed to their credit on the tableau of distribution of the tutor's estate, which is homologated by a judgment unappealed from, the minors are precluded from setting up title to the property itself, &c." See 7 *Louisiana Reports*, 17 and 34, 2 *Louisiana Reports*, 155. 6 *Ibid.* 601. 8 *Toullier, Nos.* 508-9-10.

5. The ratification of the syndic's sale in this case was made by the plaintiffs after they obtained full age, by appearing and contesting the tableau of distribution, in claiming to be creditors for larger sums than were allowed them. They did not contest the validity of the sale of the property to the defendant; the scramble was for the price in the hands of the syndic. When their oppositions were overruled, they acquiesced without appealing, and received the respective portions allowed them from the syndic. There cannot be a stronger case of ratification than this. On the subject of ratification, see the case of *M'Donald vs. Callett*, 11 *Louisiana Reports*, 503-4. *Baham vs. Baham*, *ibid.* 510; and *Foutelet et al. vs. Murrell*, 9 *Louisiana Reports*, 291, 299.

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Eastis, J., delivered the opinion of the court.

The plaintiffs claim two-thirds of a tract of land situated on the left bank of the Mississippi, about nine miles below the town of Baton Rouge, having from twelve to thirteen arpents front, which they allege belonged to their grandfather, and at a partition of his estate, was set over to their father ; that at his death it descended to them and their sister, who is not a party to this suit ; that the defendant, Huntstock, has illegally taken possession of it. They pray judgment, that they be declared to be the lawful owners of two-thirds of the land, and be put in possession thereof, and for damages, and also for the rents and profits, during the time of the adverse possession of the defendant.

The defendant, Huntstock, disclaimed, and alleged that he was in possession as the tenant of the defendant, Bernard, who became a party to the suit, and set up title.

He alleged that he was the owner of the land in dispute, having purchased it at a public sale made by the syndic of the creditors of the late Marie Rivas, the mother of the plaintiffs, for the sum of nine thousand dollars ; that the sale was in all respects regular, and that he paid the purchase money to the syndic ; that at the death of the plaintiffs' father, he left his succession encumbered with a large number of debts, and that the property in question, which was property of the community, was lawfully adjudicated to the mother of the plaintiffs, who became embarrassed in her affairs, and finally made a cession of property to her creditors ; that this tract of land was sold with the other property ceded ; that all the proceedings of the adjudication, cession, and the syndicate have been in conformity with the laws ; that the property ceded was sold principally for the purpose of paying the debts for which the community was liable ; that the plaintiffs afterwards became parties to the tableau of distribution filed by the syndic, and opposed the same, and that they received their shares of the proceeds of the sale ; that they, as heirs, took possession, and disposed of the effects left at the decease of their late mother, and thereby became bound, as warrantors, to defend and make good the defendant's title.

There was judgment in the court below for the defendant, and the plaintiffs have appealed. EASTERN DIST.
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We do not consider that the acts done by the plaintiffs, in relation to the effects of the succession of their mother, bind them absolutely as her heirs.

The property in litigation between the parties belonged to the grand-father of the plaintiffs. By an act passed between the heirs of the deceased grand-father, Francis took the land for the sum of four thousand dollars. It is true the terms "sell, bargain and transfer" are used, but we do not consider that they change the nature of the title by which the land was acquired. On the settlement of the estate, which afterwards took place, the purchase money is brought into the general account, and the share of each heir was fixed at the sum of eleven thousand five hundred and seventy-nine dollars and forty-one and three-eighths cents.

We think that the father of the plaintiffs, in point of fact, acquired this property from the succession of his father, as part of the effects thereof, and that it was his separate property, and formed no part of the community which existed between him and his wife, the mother of the plaintiffs.

In 1829, the father of the plaintiffs died, leaving the plaintiffs and their sister minors, and by a decree of the Court of Probates, the property left by the deceased husband, and held in common between the surviving wife and her minor children, was adjudicated to her at the appraised value of the inventory. In the decree of the court, the property which was adjudicated to the wife, as community property, was described to be that contained in the inventory, among which this tract of land was included.

By the article 338, of the Louisiana Code, the adjudication of property held in common between the surviving parent and their minor children, alone is authorized. The separate property of the minor can only be alienated in the forms prescribed by law. We conclude, therefore, that the interest of the minors in this land did not pass by the adjudication of the common property, supposing it to be in every respect legal as to the property affected by it.

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By the article 339, of the Louisiana Code, the adjudication of property held in common between the surviving parent and their minor children, is alone authorized. The separate property of the deceased parent descends to his children, and can only be alienated in the manner prescribed by law, for the sale of minors' property.

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If the land did not pass to the mother of the plaintiffs by the adjudication, it is clear that she had no right to cede it to her creditors, and they had no right to dispose of it. The sale by the syndic could, therefore, convey no title to the defendant, unless the plaintiffs have done some act which amounts to a ratification or a voluntary execution of the sale.

The plaintiffs, with their sister, were placed on the tableau of distribution filed by the syndic, for the sum of four thousand seven hundred and sixteen dollars and sixty-three cents ; but by an opposition, they alleged their claims on the estate to be the sum of eleven thousand five hundred and seventy-nine dollars and forty-one cents, the amount which their father had from the succession of their grand-father, which, however, it must be observed they urged hypothetically ; they allege that all the proceedings of the cession are null and void, and pray that the tableau of distribution be set aside as well as all proceedings had in the case ; but should the court maintain the proceedings, and hold them to have been lawfully conducted, they then in that event pray that they be placed on the tableau according to their rank as privileged creditors for the amount last mentioned. This opposition was dismissed, and we can see nothing in it which looks like a confirmation of the sale made by the syndic ; on the contrary, it denies and contests the validity of the whole proceedings in the strongest terms.

Our attention has been directed to some facts which it is contended amount to a ratification of the syndic's sale on the part of the plaintiffs. The sale took place on the 26th of September, 1831. The tableau of distribution was not filed until the 14th of January, 1835. The opposition of the plaintiffs was filed on the 21st of January, and the decree homologating the tableau was dated on the 3d of July, 1835. The plaintiffs were not placed on the schedule presented by their mother, but were on the tableau of distribution, as before stated. Beside the tract of land sold to the defendant, there were two other tracts of land, a house and lot, and several slaves, ceded by their mother to her creditors, and sold by the syndic on the 26th of September, 1831. It

appears, that on the 27th day of June, 1835, Mr. Buhler, the sheriff of the parish of East Baton Rouge, who was the syndic, paid on the order of Francis Rivas, one of the plaintiffs, the sum of two hundred and sixty-nine dollars and eighty-four cents; this payment was made to a judgment creditor of Rivas. But at this time the opposition of the plaintiffs contesting the validity of the proceedings was pending. The payment of *this money*, or the receipt of it, under these circumstances, by himself, unless the order or the receipt specified it, we do not think is an acknowledgment of having received a part of the price of the land in question. There is nothing in his order or in his letter from which this can be inferred.

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There is a receipt of Zenon Rivas for the amount of two instalments due for property bought by Arnous, which he afterwards had purchased. This was received on account of the portion that might be due him, after the settlement of the estate of his mother. But this receipt is dated on the 16th of September, 1833, nearly sixteen months before his name appeared on the tableau of distribution. This can be considered as ratifying nothing but the sale to Arnous.

Mr. Buhler, to whose testimony we desire to give full weight, states, that he has paid the amount due to Francis Rivas, according to the tableau: but he does not state the time nor the circumstances, so that we can ascertain whether an approval of the sale necessarily resulted from this act. The proceedings in this case have been conducted so loosely, and the parties plaintiff appear throughout to have been so ignorant of their rights, that it is with the greatest caution we should establish inferences to their detriment in relation to what is or what is not, an approval of the proceedings. We must be satisfied, before we can pronounce that this sale is binding on the parties plaintiff, that they have ratified it. Facts, in a case like this, must be established, from which the ratification necessarily results. The burden of proof is on the defendant. For the doctrine of ratification, as established in England and the United States, see *Story's Equity Jurisprudence*, section 307, and the authorities therein referred to.

Where the ratification of a sale or of certain proceedings is relied on, the burden of proof is on the party alleging it, and facts must be established from which the ratification necessarily results, when there is no positive proof.

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To give validity to a contract which is merely voidable, it must be deliberately, and upon examination confirmed by the party, to be binding on him.

It is there laid down, that to give validity to a contract which is merely voidable, it must be deliberately, and upon examination confirmed by the party. In the case of a voluntary execution of a contract, under the article 2253 of the Louisiana Code, the party executing it is presumed to know the defects which may exist in it, and to waive them by his free consent. See *8th Toullier, number 519, Commentary on the article 1338, Code Napoleon*. But in all cases there must be no question as to the fact of execution. This case turns upon the fact of a voluntary execution, or the want of it. All the acts of the plaintiffs can be accounted for, without a ratification of the sale necessarily resulting from them, and we are of opinion that no such ratification or voluntary execution has been proved. We conclude, therefore, that the land in dispute originally belonging to the plaintiffs' grand-father, was held by their father as his separate estate, that at his death it descended to them and their sister as his heirs; that the property in it remained in them during their minority, up to the present time, unaffected by any of the proceedings under consideration, and now of right belongs to them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiffs recover from the defendant two-thirds of the tract of land described in the plaintiffs' petition, and in the defendant's possession, and that the District Court proceed to make a partition thereof according to law, and to ascertain and establish the value of the improvements made by the defendant on the premises, and his claim against the parties called in warranty; and that no writ of possession issue in this case, until the parties plaintiff shall have paid to the defendant the value of his improvements; and that the appellees pay costs in both courts.

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The power of the husband over the wife, and her capacity to sue, ratify, or make a contract, is fixed by the law of their domicil. So, where a married woman residing in France, and separated in bed and board from her husband, seeks to annul a transaction, made by her agent in Louisiana, on the ground that she was *unauthorised* to cause it to be made : *Held*, that the controversy must be determined by the laws of France, and not those of Louisiana, where her legal rights, involved in the controversy, exist, and are sought to be enforced.

A transaction entered into by a woman, separated in property from her husband, in order to be valid and binding on her, an *authorisation* is necessary, under the laws of France.

In France the separation from bed and board, produces the same civil effects as to the wife, and places her in the same condition, as a separation in property ; and in both cases, her *incapacity* to contract, without the necessary authorization, or voluntarily to execute an unauthorized contract, continues until the dissolution of the marriage.

According to the laws of France, a separation from bed and board does not enable the wife to sue, ratify or make a contract, without the special authorization of her husband, or, in his absence, of the court ; and this may be given before or after the act, but the authorization or consent, must be special, or clearly result from some act in writing, for all acts already done or to be done.

It appearing that *proof* of the authorization, under which the plaintiff was proceeding in her suit, was insufficient, and that the defendant is entitled to have a final decision of the case on its merits, the court instead of non-suiting the plaintiff, remanded the cause for a new trial, and for both parties to make new proofs.

Eustis, J., dissenting, was of opinion judgment of non-suit ought to be entered, as the plaintiff would not be bound by a judgment against her, and it was unjust to allow her to litigate her rights, without being bound by a decision which might be rendered adversely to them.

The plaintiff, Madame Michelle Garnier, residing in the kingdom of France, separated in property and bed and board

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from her husband, Alexander Bonneau, alleges that she is the niece and one of the heirs and residuary legatees of the late Julien Poydras. That Poydras died in 1824, and his executors, after proceeding to collect the debts of the succession, in 1827, rendered an account of their administration and showed that they had received to the credit of the estate one million two hundred and ninety-seven thousand and forty-five dollars, of which the sum of eight hundred and six thousand seven hundred and eighty dollars, have been received and divided in different and unequal portions among the heirs, and that considerable property yet remains unsold, consisting of houses and lots in New-Orleans and New-York, and a sugar plantation in Louisiana, &c. That the testamentary heirs are Benjamin Poydras de Lalande, residing in Pointe Coupée, together with this petitioner, and several nephews and nieces living in France, but represented in this state by the said B. Poydras ; and that no partition or settlement of the succession has ever been made among the said heirs, or the portion of each ascertained, but that all the property remaining unsold by the executors, is still in a state of indivision ; and that B. Poydras took possession and has continued to enjoy the said property and the fruits and revenues, without ever rendering an account, together with money, notes and obligations, which he has collected, &c.

The plaintiff further alleges, that said B. Poydras de Lalande, claims to be the owner of the portion or share of said succession belonging to her, in virtue of a transaction or compromise made between him and Madame Mourain, her sister and agent, by notarial act, the 24th July, 1829, in which she undertook for herself, and as the agent of this petitioner, to transfer the portions of both of them, &c. That said B. Poydras relies on a ratification of this transfer or act of compromise, in sundry letters received from her since it was entered into as before stated ; but she expressly alleges that any letters written by her in relation to this transaction or the ratification, were written by her while she was a married woman, and not then separated from her husband in bed and board ; and that her sister, Madame Mourain, had no

authority to alienate or transfer her portion in the succession of her uncle ; and that she, herself, was never authorized, either by her husband or any court of justice, to make such alienation or any ratification of the same.

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Wherefore, she prays that said act or transaction be rescinded and cancelled, and that the title or claim of B. Poydras to her share in said succession, be declared null and void ; and that a partition thereof be made and decreed among all the heirs ; that B. Poydras be required to render an account of all the property, fruits, revenues and moneys by him received, and that a final partition be made thereof.

The defendant pleaded a general denial, and denied, specially, the authority and legal capacity of the plaintiff to institute this suit. He expressly avers that the plaintiff is precluded by said act of compromise, from setting up any claim to the succession of Julien Poydras, which was entered into for the purpose of settling various contestations, law suits, &c., and that she was fully apprised of its meaning and purport, and received, therefore, a full and more than adequate consideration ; and that she has ratified and confirmed this transaction since she possessed the legal capacity and authority to do so. He prays that the said act of compromise or transaction, be confirmed and declared valid. But if it should be annulled, then he sets up a large claim in reconvention, to wit : the sum of sixty-four thousand dollars for advances, claims and moneys paid over and received by her, and for which he prays judgment and restitution, &c., together with interest, &c.

Upon these pleadings and issues, the cause was tried.

It appears the plaintiff and her sister, Madame Mourain, being both heirs and legatees of J. Poydras, in March, 1825, purchased one of the plantations and slaves, in the parish of Pointe Coupée, of their deceased uncle, through the agency of Madame Mourain, who was present, for one hundred and twenty-eight thousand dollars, and gave their notes with special mortgage on the property, to secure payment ; and also, affected their shares in the succession as additional security.

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There was then various suits and contestations between the legatees and heirs, and the executors. The executors filed an account, and the defendant, B. Poydras, as heir and agent for the other heirs, took possession of the estate. It appeared that the share coming to each legatee amounted to about thirty-seven thousand eight hundred and eighty-four dollars. The price of the plantation and slaves purchased by the plaintiff and her sister, was due and unpaid ; suit was also instituted to enforce payment, and a balance, after allowing them credit for their share in the estate of Poydras, remained, for which they were bound, jointly and severally, of fifty-two thousand two hundred and thirty-two dollars. During the pendency of this suit, Madame Mourain, for herself and as the agent, acting under a power of attorney from her sister, &c., entered into an act of compromise with the present defendant, by notarial act, the 24th July, 1829. By this compromise these two legatees transferred to the defendant, *all* their rights in the estate of J. Poydras, who undertook to procure them a release from the payment of the price of said plantation and slaves.

The special object of the present suit is to set aside that act of compromise, so far as the plaintiff is concerned, on the ground that she was not duly authorized to make it, either by her husband or by a court of justice.

The authorization given to the plaintiff to enable her to make this transaction or compromise, is recited in the two powers of attorney executed by her to Madame Mourain, in 1824 and in 1827. The first authorizing her to settle her claim on Poydras's estate, under which the plantation and slaves were purchased ; and the second, approving the purchase, and authorizing her sister to sue in all cases, and to pay all accounts, &c.

The district judge presiding at the trial, after stating the pleadings, sums up the case, as follows :

"This statement of the pleading reduces the litigated points to a narrow compass ; and first, was the sale made by Madame Mourain, binding on the plaintiff ? The authority of the agent is sought in a power of attorney, dated the 18th

September, 1824, executed in France, before Louis Dubois, EASTERN DIST. notary public. This document conveys no such authority, March, 1839. and would not be binding on the plaintiff if it did, in her then situation of a married woman, not separated *de corps et de biens* from her husband. No act emanating from such a source could be legal, and, consequently, the sale or compromise possesses nothing upon which it can legally rest ; neither does the court discover any subsequent ratification. The change in the condition of the property by the release of mortgage, was the act of *defendant*, in which plaintiff did not concur, and it was his own fault if he weakened his own security by trusting to the effect of an illegal act ; neither does the sale of the property purchased by the plaintiff at the probate sale, give any additional weight to the pretensions of the defendant. She had an unquestionable right to dispose of this property, whether the mortgages were released or not. Defendant has insisted in the argument, that the sale or compromise, was not the sale of a real right ; that at the time of its execution there existed no real property belonging to the succession of Poydras, upon which it could operate so as to constitute it a real right ; that the whole property had been converted into money or credits, with the exception of a solitary house in the city of New-York, which house he has labored, and perhaps, successfully, to show plaintiff had a right to sell, without the consent or concurrence of her husband ; this position conceded, it would not benefit defendant, by sustaining any part of his defence. It might change, it is true, the manner of the *transfer*, but would not change the nature of the *property* ; it would still continue as before, *real property*, the disposition whereof would not be valid without the consent or concurrence of her husband, and this would be the only consequence flowing from such concession. The right to dispose of this description of property, (real property,) is taken from her by the positive enactments of our law. *Civil Code, article 2410.* The court, besides, is of opinion, that even in successions entirely composed of *personal* property, such a sale would be repudiated. *Civil Code, article 463.* Such rights as those attempted to be sold in the pre-

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EASTERN DIST. sent case, are *real* rights and subject to mortgage, as declared
March, 1839. by the Supreme Court in the case of Robillard against the
 present plaintiff." 11 *Louisiana Reports*, page 279.

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Judgment was rendered cancelling and annulling the act of compromise, and ordering a partition of the entire estate of J. Poydras, in the hands of the defendant, and that his demand in reconvention be dismissed.

From this judgment the defendant appealed.

R. N. and A. N. Ogden, for the plaintiff.

L. Janin, for the defendant and appellant.

Rost, J., delivered the opinion of the court.

The plaintiff being one of the legatees of Julien Poydras, sues to annul a transaction entered into by her agent, in her behalf, with one of her co-legatees, in relation to her rights in the succession, on the ground that at the time it was made, she was a married woman, separated of property from her husband, and without authority, under the laws of France, where she has always resided, to compromise upon her real rights.

The defendant denies her legal capacity to institute and maintain the present action, and further alleges—

1st. That the transaction complained of embraced only moveables, which a woman separated of property has power to dispose of, without authorization.

2nd. That the plaintiff was fully authorized to make the said transaction, whether it embraced moveable or immoveable property.

3rd. That if she had not been, she voluntarily executed it, after her incapacity had ceased.

Judgment was given in favor of the plaintiff, in the court below, and the defendant appealed.

We take it for granted, that the power of the husband and the capacity of the wife are fixed by the law of their domicile, and that the present controversy is to be determined by the laws of France.

The defendant's counsel have not established the fact that the transaction embraced only moveable property. If it were admitted that the title to the house in New-York, which formed a part of the mass, never vested in the plaintiff, and that all the real property belonging to the succession of J. Poydras, situated in Louisiana, had been legally sold before its date, the *jus in re* which the executors retained, in the nature of mortgages, in conformity with the directions of the will, preserved to the proceeds of the sale the character of realty; the account of the executors, showing the mass upon which the transaction took place, contained mortgage claims to the amount of several hundred thousand dollars, and the very debt given up to the plaintiff in consideration of that contract, was a real, not a personal right. We are, therefore, of opinion, that an authorization was necessary, and that without it, a voluntary execution on the part of the plaintiff, after she was separated from bed and board, but before the dissolution of the marriage, could not be opposed to her. "In France," says *Merlin, Repertoire Jurisprudence, ver-bis Autorisation, maritale et separation de corps*, (separation from bed and board,) considered with respect to its civil effects, procures to the wife the same advantages and places her in the same condition (*dans le même état*,) as the separation of property." Her incapacity continues until the dissolution of the marriage, and while it lasts, the voluntary execution of a contract made without authority, cannot be opposed to her. *Code Napoleon, articles 217, 219, 1338.*

The only question in this case is, whether the plaintiff was at any time authorized to make the transaction, or to execute it after it was made; and if not expressly authorized, whether that authorization necessarily results from other powers given to her by her husband or by the court. We understand the law of France to be, that the consent of the husband, or in his absence, of the court, may be given before or after the execution of the unauthorized contract, and that any act in writing from which that consent to acts done clearly results, satisfies the requisition of the statute. The authorization must be special for all acts to be done; but it

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A transaction entered into by a woman, separated in property from her husband, in order to be valid and binding on her, an authorization is necessary, under the laws of France.

In France, the separation from bed and board produces the same civil effects as to the wife, and places her in the same condition as a separation in property; and in both cases, her incapacity to contract, without the necessary authorization, or voluntarily to execute an unauthorized contract, continues until the dissolution of the marriage.

According to the laws of France, a separation from bed and board does not enable the wife to sue, ratify, or make a contract, without the special authorization of her husband, or in his absence of the court; and this may be given before or after the acts, but the authorization or consent must be special, or clearly result from some act in writing, &c.

EASTERN DIST. may embrace all acts already done, because these are always
March, 1839. certain and specific.

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The record contains a judicial authorization given to the plaintiff, in 1831, on her application to sell the undivided half of a plantation which she had acquired in Louisiana, being thereunto, as she alleges, duly authorized, with funds arising to her profit out of the succession of J. Poydras. She is further authorized to do, and undertake all necessary proceedings as plaintiff or defendant amicably or judicially, to arrive at the final partition of her rights in the succession of J. Poydras. The proceedings had upon this application are annexed to the decree, with the exception of the report of the *juge commis*, which we presume, contained the facts made known to the court, and show the actual situation of the plaintiff at the time. The plaintiff, in her petition to the French tribunal, and her counsel in the brief submitted to us, admit, that another judicial authorization was given to her in 1825, to sanction the purchase made of the plantation by her sister. The plaintiff was separated of property in 1821, and her husband had then been absent for many years, and has never returned. Julien Poydras died in 1824. Under these circumstances, we are inclined to believe that another judicial authorization to accept the succession must have existed, as is stated in the power of attorney of the plaintiff to Madame Mourain, in 1824. Under the law of France, the court could not, and dare not have authorized her to sue for a partition, as legatee pure and simple, without first having ascertained the value and charges of the succession. The powers given, as far as they are known to us, are special in nothing, except in the purchase and sale of the plantation. The knowledge of the facts which were made known to the French court by the plaintiff, when they were obtained, can alone enable us to ascertain their extent. Without it we are unable to do justice between the parties. It may be true, that the *onus pro bandi* lay on the defendant, and that what he has failed to prove, is, as if it did not exist; but if we held him bound by the strict rules of the law of evidence, those rules would compel us on the other hand, to dismiss

the plaintiff's action, on account of her want of authorization. Under the laws of France, as we have already stated, separation from bed and board does not enable the wife to sue without a special authorization ; and the plaintiff does not allege that she sues under any ; it is true, however, that the general authorization given to her in 1831, was introduced in evidence for some other object, and is found in the record. It is unnecessary to determine whether this would be sufficient in any case, unless she had alleged that she was proceeding under it, for we are of opinion that the authorization itself, did not contemplate the present suit, and is insufficient to maintain it.

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Under the transaction which the plaintiff seeks to avoid, she took her share of the risk of two suits then pending against the succession, to wit., that of the *Heirs of Bird* and that of *Leocadie Poydras*, and these had to be terminated before she could ascertain her rights in the succession. If the authorization was given in reference to those suits, and the stipulations of the compromise, it was sufficient ; but if it referred to all the affairs of the succession, and the court went upon the supposition that no act had yet been done therein by the plaintiff, the general authorization to proceed at law as plaintiff or defendant, in order to arrive at a final partition of her rights, does not empower the plaintiff to sue one of her co-legatees, to avoid a private contract made with him. If the law requires a special authorization to enable the wife to make a contract, it also requires a special authorization to attack it after it is made ; and in both cases alike, the court will only grant it *en connaissance de cause*. In a case cited by the plaintiff's counsel, as having occurred to the plaintiff herself, after she had been authorized to accept purely and simply the succession of one of her sisters, although the solvency of the succession was notorious, and she could run no risk, the court refused to authorize her to sue and be sued on all principal or incidental demands, and to make all sales and settlements, on the ground that the right of authorization can only apply to facts known and specified, to demands actual and certain, and not to eventu-

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March, 1839.

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FOTDRAS.

alities more or less probable; we concur in that interpretation of the law, and we are satisfied that the authorization of 1831 is insufficient. It is the allegation of similar defect which has given rise to this controversy, and the defendant is entitled to have it conducted in such a manner as will insure a final decision.

Upon the whole, we are of opinion, that this case ought to be remanded to the District Court, in order to enable both parties to make proof of the various authorizations under which they claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that this cause be remanded for a new trial; and that the plaintiff and appellee pay the costs of this appeal.

Eustis, J., dissenting; was of opinion, judgment of non-suit ought to be entered, as the plaintiff would not be bound by a judgment against her, and it was unjust to allow her to litigate her rights without being bound by a decision which might be rendered adversely to them.

Eustis, J. I dissent from the opinion of the majority of the court.

The disability of the plaintiff, a married woman, separated from bed and board from her husband, to institute this suit without the authority of her husband or a court of justice, was pleaded specially by the defendant; and this court has come to the conclusion, that under the laws of France, the place of domicile of the plaintiff, such an authority was requisite to enable her to bring that action, but that no such authority had been proved. In my opinion, the suit ought to have been dismissed, and judgment entered as in case of non-suit. Had a judgment been rendered against her, she would not have been bound by it; and I consider it unjust to permit her to litigate her rights, without being bound by a decision which should be rendered adversely to them.

HODGE'S HEIRS *vs.* DURNFORD'S CURATOR.

EASTERN DIST.

April, 1839.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY
OF NEW-ORLEANS.

HODGE'S HEIRS
vs.
DURNFORD'S C'A.

Where an executor's account was rendered in 1804, and appears to have been communicated to the adverse party, without any objections being made, or proceedings had in relation to it, until 1820, it was presumed to have been acquiesced in, and the court adopted it as the basis of its judgment; being the safest mode of doing justice between the parties.

An extra judicial settlement of an estate between the executors and the heirs, when the parties are all of age and under no disability of contracting, is perfectly valid, and rests, necessarily, on the same footing as any other convention.

This case was before the court at its February term, 1837, on an application for a *mandamus* commanding the judge of probates to allow an appeal from an interlocutory order, requiring the defendant, as curator of Durnford, to render an account. 10 *Louisiana Reports*, 497.

On the production of the mandate of this court, disallowing the *mandamus*, and requiring the cause to proceed, the defendant filed his plea of prescription. The plaintiffs then produced, and offered in evidence a document signed by Durnford, in March, 1804, purporting to be an account rendered by him as executor, which they stated they offered for the sole purpose of repelling the plea of prescription, and without admitting any of the items contained in it.

The plea of prescription was overruled, and the curator filed an account, made out from the one of Durnford, in 1804. The plaintiffs filed written exceptions and opposition to it. The defendant's counsel objected and excepted to the right of the plaintiffs to make opposition, on the ground of their long silence since the rendition of this account by Durnford, but the court overruled this exception, and its opinion was excepted to.

After hearing all the evidence and the arguments of counsel, the judge of probates gave judgment in favor of the plaintiffs for the sum of thirty thousand eight hundred and

EASTERN DIST. seventy-five dollars and eighty-seven cents, to be recovered
April, 1839. from Durnford's estate.

HODGE'S HEIRS

vs.

DURNFORD'S C'N.

The curator appealed.

The material facts of this case are stated in the opinion of the court.

D. and J. Seghers, for the plaintiffs, urged the affirmance of the judgment.

Strawbridge and Grymes, insisted in argument, that the account of Durnford, which he rendered of his administration of Hodge's estate, in March, 1804, should, from the great lapse of time, be considered as acquiesced in by the plaintiffs, and taken as the basis of the settlement of his liabilities as executor. It has been produced by the plaintiffs' counsel, which shows it was communicated to them, and they have acquiesced in its general correctness, without objection, for nearly twenty years.

2. The defendant's counsel also denied the jurisdiction of the Probate Court, in a matter of contestation between persons of full age. They likewise urged their plea of prescription.

Eustis, J., delivered the opinion of the court.

The plaintiffs, alleging themselves to be the testamentary heirs of the late David Hodge, sued Thomas Durnford, whom they charge to have been one of the testamentary executors, and as having acted by appointment for the other executors of their testator, for an account. On the 3rd day of September, 1823, citation issued, and the defendant answered by his attorney, denying the capacity of the plaintiffs, as heirs, or that he had any funds of the estate of the late David Hodge in his hands; alleging, on the contrary, that the said estate was indebted to him in large sums of money: the general issue was also pleaded, and the prescription of one, two, five, ten, twenty, and thirty years.

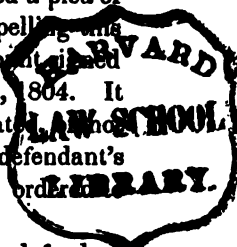
In 1828, Durnford died, and Mr. John M'Donough, on the 24th of December of that year, being the curator of

the deceased, whose succession had been opened in the court below, was made a party defendant to the suit, in his capacity of curator. EASTERN DIST.
April, 1839.

On the 14th of August, 1837, judgment was rendered against the present defendant, as curator of Durnford, for the sum of thirty thousand eight hundred and seventy-five dollars and eighty-seven cents, from which judgment he has appealed. RODGE'S HEIRS
vs.
DURNFORD'S C'RS.

On the question of jurisdiction of the Court of Probates, raised by the defendant's counsel, after due consideration of the subject in all its bearings, we adopt the opinion expressed by this court in this suit, on a former occasion. See 10 *Louisiana Reports*, 497.

Hodge died in New-Orleans, in August, 1791; Durnford, as one of his executors, and by appointment of the others, took possession of his estate, of which an inventory was made, and of which he appears to have had the sole administration.

On the 30th of August, 1836, the defendant filed a plea of prescription, and as is stated, for the purpose of repelling this plea, the counsel for the plaintiffs produced an account, signed by Thomas Durnford, dated on the 25th of March, 1804. It was produced under a reservation, as is also stated, and without admitting any of the items contained in it. The defendant's plea of prescription was overruled, and he was ordered to render an account. 

On the fifteenth of September following, the defendant renders this very account which had been thus produced by the plaintiffs as the account of the administration of Thomas Durnford, which he prays may be homologated, and that he be discharged from any further responsibility in relation to the plaintiffs' claims.

Hodge, who was a merchant in New-Orleans, left, at the time of his death, apparently a large estate, considering the condition of the country at that time; his testamentary dispositions were, as is not unusual, ostentatious, but even at this remote period we have evidence before us that he left unpaid debts which had long before been contracted, and which show on his part great looseness in the transaction of

EASTERN DIST. his business. He left among his papers a list of assets and
April, 1839. debts which appear to have been due to him, to which was
 affixed this declaration :—

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“As it seems very probable that I may be taken suddenly in a fit, and in case it should be so, I keep in my pocket a little kind of memorandum of most of my property and demands in this country; that is, exclusive of lands, lots, houses, etc., which will more fully appear by the bonds, notes, accounts current, cash blotter, and the copy book of letters, as most part of my papers and books were burnt at the fire, since which, as I have but little business, I have kept no regular set of books. It is to be observed that there are some bonds and notes put in my name, which is done in case I should be under the necessity of recovering them by law, but in reality they are the property of those persons, agreeably to the directions.” Dated September, 1790.

He left lots in Baton Rouge, Pensacola, and Natchez, and a few negroes, which were all disposed of by Durnford, and large tracts of land in that part of Louisiana which lies between the Perdido and the Mississippi, and known by the name of West Florida. This account of March, 1804, is an account of Durnford's administration of the estate of Hodge. There is nothing on its face from which we can infer any thing but fairness on the part of the executor, and before we examine the objections to it, let us consider some circumstances attending it which are by no means unimportant. By the Spanish law, the executorship of Durnford expired in a year. In the latter part of 1792, he was bound to render his account, and deliver possession of the estate to the heirs. From that time to 1804, no steps appear to have been taken towards a settlement with him, and for the first time, in the year 1836, nearly forty-four years after the executorship had expired, and nearly thirty-two years after its date, this account makes its appearance, in the possession of the plaintiffs.

It is urged that the defendant, the curator of Durnford, has no means of rendering any other account than this. It is not shown by the inventory of Durnford's estate, or other-

wise, that any documents have come to the possession of the defendant which have been withheld, or from which he would be enabled to make out an account of the administration of Durnford of Hodge's estate. It appears there were two trunks of papers at the disposal of the court below, but our attention has been called to no evidence which weakens the conclusions to which we have come on a full investigation of the whole subject. On the 21st of March, 1820, the plaintiffs instituted in the District Court a suit against Durnford, the Executor of Hodge, of the same character as that under consideration. Durnford rendered an account, which, with the exception of one item, we do not find inconsistent with that of March, 1804. It contains certain charges which are alleged to have accrued since 1804, and brings the plaintiffs in debt to the curator in a balance of five thousand three hundred and twenty-seven dollars. This suit was discontinued, and the present suit instituted in the Court of Probates. It is alleged, in the petition, that in September, 1803, they appointed Patrick Morgan their attorney, and gave him full power to call upon the said Thomas Durnford for a settlement of said estate, and to receive from him the balance of such sums as might remain in his hands, after paying the debts of said estate; that under said power, *Morgan applied to Durnford for an account*, and for the delivery of the papers and property of the estate in his hands, and on the refusal of Durnford, in the year 1805, they commenced suit against him, and before any decree could be had, Morgan, their agent, died, and they afterwards appointed another agent, who instituted the suit in the District Court which was discontinued. In the absence of any direct proof, on a consideration of all the circumstances, we are of opinion that the account of March, 1804, must be taken to have been communicated to the plaintiff within a reasonable time after its date. It is not proved that a suit was instituted in 1805, against Durnford, or at any time previous to March, 1820. We, therefore, infer that this account remained with them, without objection, from 1804 till that time. By this account, the sum of three thousand and sixty-five dollars and sixty-

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HODGE'S HEIRS
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Where an executor's account was rendered in 1804, and appears to have been communicated to the adverse party without any objection being made, or proceedings had in relation to it, until 1820, it was presumed to have been acquiesced in, and the court adopted it as the basis of its judgment, being the safest mode of doing justice between the parties.

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April, 1839.

HODGE'S HEIRS
vs.
DURNFORD'S C'N.
An extra judicial settlement of the estate between the executors and the heirs, when the parties are all of age, and under no disability of contracting, is perfectly valid, and rests necessarily on the same footing as any other convention.

five cents was due to the plaintiffs. It must be recollected, that by the change of government in Louisiana, in 1803, the tribunal under which Durnford was appointed, and to which it is alleged he was amenable for the settlement of his administration of Hodge's estate, had ceased to exist. His responsibility could only have been established at that time by a suit in the ordinary tribunals of the country. No such suit was instituted until 1820 ; an extra judicial settlement of the estate was perfectly valid at that period. Indeed, the settlement of a succession when the parties are all of age and under no disabilities of contracting, rests necessarily on the same footing as any other convention upon which courts are called upon to act only when the parties cannot agree, or the interests of others are liable to be affected by their acts.

We coincide with the opinion of the judge of the Court of Probates, on the liability of the curator's estate for the Florida lands. The judge disallowed some items of the account which were unsupported by proof, and charged the curator's estate with the sum of twenty-six thousand five hundred and seventy-two dollars and twenty-five cents, for uncollected claims due to the estate.

After this lapse of time, and the rendition of the account of March, 1804, having before us evidence of the mode of doing business of the deceased, and that many of the debts were of long standing ; some belonging, in fact, to other persons, and some prescribed at the time of taking the inventory ; when we take into consideration the condition of the administration of justice in the colony at that remote period, the difficulty of communication with and the remoteness of the residence of some of the debtors, the silence of the plaintiffs for so long a time, and the appearance of good faith in the account rendered, we feel ourselves bound to make it the basis of our decision, as the safest mode of doing justice between the parties. See 1 *Story's Equity Jurisprudence*, section 523. *Baker vs. Biddle*, 1 *Baldwin*, 419.

We have considered the pleas of prescription and the several points to which our attention has been directed by counsel, and after the best examination we have been able to

give the subject, we conclude to allow the balance of the	EASTERN DIST.
account of March, 1804,	April, 1839.
\$3,065 62	
Less sundry debts not due, though credited,	REYNOLDS
1,141 75	vs.
\$1,923 87	SWAIN ET AL.

We allow the six bales of cotton mentioned in the account,

243 00

\$2,166 87

The judgment of the Court of Probates, is, therefore, reversed, and judgment is awarded in favor of the plaintiffs against the defendant, curator of Durnford, for the sum of two thousand one hundred and sixty-six dollars and eighty-seven cents, with legal interest, the appellees to pay costs.

It is ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; that judgment be awarded in favor of the plaintiffs against the defendant, curator of Durnford, for the sum of two thousand one hundred and sixty-six dollars and eighty-seven cents, with legal interest, from the date of the rendition of the judgment by this court; the appellants to pay the costs of the court below, those of appeal to be borne by the appellees.

REYNOLDS vs. SWAIN ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS PRESIDING.

A contract of lease, either verbally or in writing, made by one partner, is binding on the partnership, when it appears the firm occupied the leased premises, and in which the affairs of the partnership were conducted.

181	193
45	798
131	193
49	734
49	1242
13	193
110	790
13	193
115	192
115	193

EASTERN DIST.

*April, 1839.*REYNOLDS

vs.

SWAIN ET AL.

Even in ordinary partnerships, the contract of one partner, made without the authority of the others, is binding on them, if it appears the partnership was benefited thereby.

Where a tenant abandons the leased premises before the expiration of the lease, he is *at once bound* for the rent of the *whole term*, and may be sued.

The repeal of the Roman, Spanish and French civil laws, in the article 3521 of the Louisiana Code, and the repealing act of 1828 only embraces the positive, written or statute laws of those nations and of this state, such as were introductory of a new rule, and did not abrogate the established *principles* of law, and settled by the decisions of courts of justice.

The principles settled in the case of *Christy vs. Casanave*, 2 *Martin, N. S.*, 451, making tenants who *abandon* their lease, *liable at once* for the rent of the *whole term*, although drawn from the Roman civil laws, which have no intrinsic authority here, yet the reason of them has great cogency, and are adopted for the elucidation of principles applicable to analogous cases.

This was an action on a verbal lease, to recover the sum of fifteen hundred dollars, for one year's rent, *due and to become due*.

The plaintiff alleges, that he leased to the defendants, W. W. & T. Swain, through his agent, by verbal agreement with W. W. Swain, a certain brick tenement, on the corner of Poydras and Magazine streets, in the city of New-Orleans, for the *price* of fifteen hundred dollars per annum, payable in monthly instalments of one hundred and twenty-five dollars, each as they became due; the lease to commence the 1st day of November, 1836, and continue for one year. He further alleges, that the defendants occupied the leased premises, as apothecaries, under the firm of W. W. Swain & Co., from the 1st of November, 1836, until the last of December following, (two months,) and then abandoned and removed from them without cause, refusing to pay the rent; that they have thereby violated their said lease, and become liable for the entire amount thereof. He then prays judgment *in solido* against the-defendants, for the whole sum claimed.

This suit was instituted the 26th of April following the commencement of the lease. EASTERN DIST.
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The defendant pleaded a general denial. Upon these pleadings and issues the cause was tried.

The plaintiff introduced as a witness the agent who made the contract of lease, who deposed, that he leased the brick tenement or store mentioned, to the defendants, for one year, commencing on the 1st of November, 1836, for the price of fifteen hundred dollars, payable monthly, in instalments of one hundred and twenty-five dollars each. That this agreement was made verbally with Wm. W. Swain, one of the defendants, at the time the lease was to begin, and that about fifteen days afterwards he presented a written lease to the defendants, who refused to sign it. He then told them he would hold them responsible for the rent on their verbal lease. It appeared, the firm of Wm. W. Swain & Co., which was composed of the defendants, occupied the premises about two months, and left them without any cause.

The plaintiff's agent refused to receive the keys, and wrote them a note that he would hold them responsible for the lease.

This testimony was corroborated by another witness, and by the written lease which had been tendered.

The district judge was of opinion, the verbal lease was proved, as also its violation by the lessees, and that the plaintiff was entitled to recover the entire sum claimed. Judgment was rendered in favor of the plaintiff for fifteen hundred dollars, with leave to take out a general execution or special execution of seizure of the property on the premises, subject to privilege for the rent, for the sum of eight hundred and seventy-five dollars, being the amount of rent due the 1st day of June *instant*, and so on from month to month, for the sum of one hundred and twenty-five dollars per month, on refusal of defendant to pay the same. The defendants appealed.

Curry, for plaintiffs, contended, that the testimony showed that the defendants occupied for a while the premises men-

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tioned in the petition, under a verbal lease, made for one year, from the 1st of November, 1836, for which they bound themselves to pay the sum of fifteen hundred dollars in monthly instalments of one hundred and twenty-five dollars, from month to month, until the expiration of the lease. This is the amount of the sum claimed.

2. The testimony further shows, that the defendants abandoned and violated their lease, at the end of two months after the commencement of the term, without cause, and have refused to pay the rent. These facts being shown, the plaintiff is entitled to sue at once and recover the sum of fifteen hundred dollars for *rent due and to become due* on said lease. The law authorizes landlords, and secures to them the privilege of enforcing the contract of lease for the *whole term*, if the tenant leaves the premises before the expiration of the lease. See *Christy vs. Cazanave*, 2 *Martin, N. S.*, 451.

3. The district judge gave judgment *in solido* against the defendants for the sum claimed, but only allowed execution to issue for the sum actually due at the time, and for the balance, to issue from month to month until it is all paid. The plaintiff does not complain of this judgment, and prays that it be affirmed with costs.

T. Slidell, for the defendants and appellants, insisted, that a partnership and the property of the firm, cannot be made liable for the debt or contract made separately and upon the individual responsibility of one of the partners, as was the case here. The testimony shows, that the contract of lease was made with Wm. W. Swain individually. It would be doing injustice to the other partner, who had no contract with the plaintiff; and to the partnership creditors, whose claims on the partnership property should be first paid.

2. This suit was prematurely brought, as to that part of the rent claimed, which was not due at the time of the institution of suit; and the judgment should be reversed for that amount. The case of *Christy vs. Cazanave*, which is relied on to sustain the plaintiff's demand, for the entire amount of rent, due and to become due on this lease, cannot have the force of authority. It was decided in 1824, before

either the adoption of the Louisiana Code, or passage of the act of 1828, both of which expressly repeals all the civil laws not contained in the code. This decision is founded on an express provision of the Roman civil law, which has long since been repealed in this state.

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Martin, J., delivered the opinion of the court.

The plaintiff claims from the defendants, commercial partners, *in solido*, one year's rent of a store, payable by monthly instalments, they having left the premises before the expiration of the lease.

The defendants pleaded the general issue.

The court gave judgment *in solido*, for fifteen hundred dollars, with leave to take out execution for the sum of eight hundred and seventy-five dollars, being the amount of rent due and payable at the date of the judgment, and so from month to month, for the sum of one hundred and twenty-five dollars, until the whole be paid. The defendants appealed.

Their counsel has contended, that the premises were rented by one of the defendants, in his own name, and, therefore, the partnership is not bound for the rent.

2nd. The suit was premature, for part of the rent was not due at the time it was brought.

It appears that one of the defendants rented the premises, verbally, and afterwards a written lease was offered for his signature, in which his individual name was used. But it appears, also, that the store was occupied by the partnership until it was abandoned. This latter circumstance shows that the contract was made for the affairs of the partnership; it is, therefore, bound by the act of one of the partners, though made in his individual name. Even in an ordinary partnership, the contracts of a partner, though without the authority of the others, bind them, provided it be proved that the partnership was benefited by the transaction. *Louisiana Code, 2845.*

In the case of *Christy vs. Cazanave, 2 Martin, N. S., 451*, this court held, that if the tenant abandoned the premises during the lease, he is bound for the rent for the whole term

A contract of lease verbally or in writing, made by one partner, is binding on the partnership, when it appears the firm occupied the leased premises, and in which the affairs of the partnership were conducted.

Even in ordinary partnerships, the contracts of one partner made without the authority of the others, are binding on them, if it appears the partnership was benefited thereby.

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Where a tenant abandons the leased premises before the expiration of the lease, he is at once bound for the rent of the whole term and may be sued.

at once. It has been contended, that this decision took place under the civil laws of this state, which were repealed in 1828, and before the promulgation of the Louisiana Code, which provides that the Spanish, Roman, and French laws, which were in force in this state when Louisiana was ceded to the United States, and the acts of the legislative council, of the legislature of the territory of Orleans, and of the legislature of the state of Louisiana, are repealed in every case, which are specially provided for by that code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of the code. See *Louisiana Code*, article 3521.

The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal; *eodem modo quiquit constituitur, eodem modo dissolvitur*.

The civil or municipal law, that is, the rule by which particular districts, communities, or nations are governed, being thus defined by Justinian—"jus civile est quod quisque sibi populus constituit." 1 *Blackstone's Commentaries*, 44. This is necessarily confined to positive or written law. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept.

The repeal of the Roman, Spanish and French civil laws, in the article 3521 of the Louisiana Code, and the repealing act of 1828, only embraces positive, written or statute laws of those nations and of this state, such as were introductory of a new rule, and did not abrogate the established principles of law, and settled by the decisions of courts of justice.

We, therefore, conclude, that the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations, and of this state; and only such as were introductory of a new rule, and not those which were merely declaratory—that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice.

Testing the judgment of this court, in the case of *Christy vs. Cazanova*, by these rules, we do not find it grounded on any statute of Spain, of the late territory or the present state. We know not any Roman or French statute which was in

force in this country at the period of the cession, and to which the repeal in the code and the act of 1828 could extend. Nevertheless, it is the daily practice in our courts to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analagous cases. Although the Roman law, on which the case of *Christy vs. Cazanova* was determined, had no intrinsic authority here, the reason that dictated that law has great cogency. When a tenant removes his goods from the premises, and abandons them, he withholds from the landlord the pledge he had given for the payment of the rent. It is, therefore, just that the latter should be permitted immediately to secure himself, if he can, by the seizure of the property removed, or by a personal action against the tenant.

The district judge has provided for the security of the latter, by directing that the execution should not immediately issue for more than the amount of the debt actually payable; and afterwards, at the end of every month, for the monthly rent, affording him the opportunity of seeking relief, if he has any right thereto, on account of any rent received by the plaintiff from other tenants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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HIS CREDITORS.

BELL vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The act for the relief of insolvent debtors in actual custody, requires as a pre-requisite to obtain the relief it affords, if the applicant is a merchant or trader, that he deposit in court his books and accounts, along with his schedule.

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So, where the debtor was a dealer in corn and hay, and had a small grocery store attached to his business, but kept no books or memorandums, except a small book in which he entered his purchases of corn, and he deposited none in court: *Held*, that although the law does not expressly require a merchant or trader to keep books, yet, to be entitled to its benefits, *he should have and deposit them* in court, for the inspection of his creditors.

This case comes before the court on the application of the plaintiff, an insolvent debtor, who is in actual custody or confinement, to be discharged under the provisions of the insolvent law of 1808. Several oppositions were made, but one ground of opposition was, that the insolvent, being a merchant or trader, had not deposited in court his books and accounts along with his schedule.

On hearing the testimony and circumstances of the case, the district judge presiding, was of opinion that the applicant was a trader, and that to entitle him to the benefit of the insolvent law in question, he must have kept books and deposited them in court for the inspection of his creditors. The application was refused and the insolvent debtor appealed.

M^cKinney, for the plaintiff and appellant.

Randall, contra.

Martin, J., delivered the opinion of the court.

The insolvent is appellant from a judgment, which denies him the benefit of the act for the relief of insolvent debtors in actual custody. 1 *Moreau's Digest*, 567.

The relief was denied on the opposition of one of the creditors, on the suggestion that the insolvent was a trader, and had not complied with the requisition of the second section of the act, which requires that the insolvent "deposit in the office of the clerk of the court, all his books and accounts, (if he is a merchant or trader.)"

The insolvent being examined on oath, declared, "he has been trading in the corn and hay business, and has kept a gro-

cery and small grog-shop attached to the same, within the past year. He kept no books or memorandums, except when he bought a boat load of corn. He kept an account of it in a small book, which was of no use after the corn was purchased, as the business for which it was used was then at an end. He kept no books or memorandum in the grocery. He filed no documents in this court when he filed his schedule. He says, that in trading, together with the business of his grog-shop, he might have bought and sold in the course of the year, something like twenty thousand dollars."

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His counsel has contended, that no law imposes on a trader the obligation of keeping books or accounts; and the act, the benefit of which he claims, requires only that a debtor, who seeks the benefit of it, should file his books and accounts; that is to say, such books and accounts as he had been keeping, if any. So, a debtor, who has kept no books or accounts, does not come within the purview of the section relied on by the opposing creditor and appellee, that keepers of grog-shops seldom, if ever, keep books.

It is true the law imposes on a trader no obligation of keeping books or accounts. In the case of *Andrews vs. His Creditors*, 11 *Louisiana Reports*, 474, we held, that the act under consideration could well impose on those who implore the benefit of it, the condition that they should have abstained from acts which, in the place of their residence, are perfectly lawful and fair. In the same manner, the act may require, as a condition, that the applicant should have done something which he was under no obligation to do; thus, although the law does not require that a trader should keep books and accounts, it makes it a condition of his being admitted to the relief which the insolvent seeks, that the trader should have kept books and accounts, in order that by depositing them with his schedule, in the office of the clerk, he may convince his creditors and the court, that his discomfiture is the result of untoward circumstances, and not of dissipation, profligacy or fraud, by showing in what manner the property which came to his hands was disposed of.

So, where the debtor was a dealer in corn and hay, and had a small grocery store attached to his business, but kept no books or memorandums, except a small book in which he entered his purchases of corn, and he deposited none in court: *Held*, that although the law does not expressly require a merchant or trader to keep books, yet to be entitled to its benefits, he should have and deposit them in court, for the inspection of his creditors.

In the present case, the insolvent admits that he kept a

EASTERN DIST. small account book when he purchased a load of corn, which
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It appears to us, the court did not err in refusing the relief sought by the appellant on this ground of opposition ; there are others, which the view we have taken of the first, renders the examination unnecessary.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

NOTT vs. BOTTS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS PRESIDING.

This case involves simply a question of fact, turning upon the credibility of a witness, and the judgment of the inferior court is affirmed.

The facts and law of this case are comprised in the following opinion and judgment rendered by the district judge presiding :—

“ This is an action of redhibition, arising out of the sale of a slave by defendant to plaintiff. The alleged redhibitory vice is that of the habit of running away.

The sale of the slave took place on the 4th November, 1835. The slave was hired to the cotton press, and left the press on 30th May, 1836—the plaintiff says by reason of sickness, but there is no evidence to this fact. The slave returned to the cotton press on 24th June, 1836, staid one day, and has not since been seen.

Another witness testifies that he is intimate with plaintiff, and knows that the slave ran away, and has not since been heard of. The only evidence as to any previous habit of running away is that of L. Jacobs, who was employed as

broker by defendant to sell the slave to plaintiff, who testifies, that after the sale, while sitting in the corridor of witness's house, where defendant boarded, the slave came in. That witness asked him how he liked his situation? The slave answered, very well. That defendant then observed, he feared he might have some trouble about him; and on witness asking how, defendant said he was afraid he would run away, as he had given him the slip up the country.

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In the case of *Hilligsberg vs. The New-Orleans Canal and Banking Company*, the evidence necessary to maintain an action of redhibition was discussed, and I then, as now, considered, that the code, article 2505, fixes the minimum of evidence or facts necessary to maintain an action of redhibition, and I did not consider that the evidence in that case nor in the present is sufficient to maintain the action.

Plaintiff's counsel urges, that as he considers that defendant knew of one running away, and evidence was offered of this knowledge, defendant would be liable, as in an action of deceit, for false representation of character; and as the evidence was offered without objection, it may be used to maintain that action. This is too insidious a mode of bringing or maintaining an action.

The evidence was properly offered to maintain plaintiff's part of the issue, and could not have been successfully resisted as *pro tanto* maintaining that issue: to allow it to be used to maintain, because also applicable to an entirely different ground of action, not suggested in the petition, would be to entrap a party.

The evidence itself is of a peculiar character. The witness is at enmity with the defendant—is a negro broker. The story itself not very probable. It is evidence of confession—and is the weakest or strongest evidence, according to circumstances. When testified to by a single witness, without being enforced by circumstances, it is the weakest of evidence; when satisfactorily established, it is the strongest.

In the present case it appears to be the weakest of evidence. There is nothing extraordinary in the fact of a negro coming from Kentucky, where they are treated almost on an equality with their master, running away in Louisiana.

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The plaintiff made no attempt to prove the negro's character at the place from whence he is represented to come ; it does not appear to me that there is sufficient evidence to entitle the plaintiff to recover. It is, therefore, considered, that there be judgment for defendant, and that plaintiff pay costs of suit."

From this judgment the plaintiff appealed.

Benjamin, for the appellant. 1. The judgment of the court below is clearly erroneous, as being a final judgment against plaintiff, whereas it should be a judgment of non-suit, even if plaintiff has failed to make out his case.

2. But plaintiff has clearly shown that the slave sold by defendant had been a runaway, during the time that defendant owned him ; that defendant knew this fact, was apprehensive that the slave would run away again, and yet concealed this circumstance from plaintiff, and gave a false representation of the slave, as being one of unblemished character, and free from vice : the sale should, therefore, be rescinded. *Louisiana Code*, 2505, 2525, 1841.

Preston, for defendant. This case presents a question of fact alone, and the evidence fully supports the judgment.

Eustis, J., delivered the opinion of the court.

This is a case involving a question of fact, which turns upon the credibility of a witness. On examining the evidence, we do not feel ourselves authorized to disturb the judgment of the court below ; it is, therefore, affirmed, with costs.

CARMICHAEL *vs.* AIKIN'S HEIRS.

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April, 1839.APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
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vs.

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In a sale for taxes due the corporation of New-Orleans, by non-resident owners of lots, the name of the owner must in all cases be given and published in the proceedings. The designation that the owner is unknown, is insufficient to make such sales valid.

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The debt or corporation tax due by non-resident owners of lots, must be proved, contradictorily with the attorney appointed to represent the absentee, and must be so stated in the judgment.

In a forced sale for taxes, of lots in the city, it is insufficient to designate the lot by its number, and *that* of the square it is in. It should be described, and its extent and boundaries given.

This is an action by the plaintiff, residing in the state of Mississippi, to recover a lot of ground in the city of New-Orleans, in the possession, and claimed by the heirs and legal representatives of Oliver Aikin, deceased.

The plaintiff shows title to lot No. 5, in square No. 58, fronting on Magazine and Robin streets, and alleges that he has always had an agent in Louisiana, to pay all his taxes and other dues on his property in this state. He prays judgment for the possession of said lot, and that it be declared to belong to him as owner, and for general relief.

The defendant pleaded a general denial, and further averred, that he purchased the lot in controversy from C. Toledano, which is worth five thousand dollars. He calls Toledano in warranty, and in case of eviction, prays judgment over against him for this sum, and for one thousand dollars for his improvements.

Toledano appeared and pleaded a general denial, and averred that he purchased said lot at a sale for taxes, made by the city marshal of New-Orleans, on the 20th May, 1828, in virtue of an execution, on a judgment obtained by the mayor, aldermen and inhabitants of the city of New-Orleans, before G. Préval, one of the city judges; that said sale was made in conformity with law.

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He further avers, that he paid the price of said sale to the city of New-Orleans, and has made considerable improvements on said lot, and been at sundry expenses on account of it, all of which the corporation is bound to refund ; as, also, the increased value, in case of eviction. He, therefore, calls the corporation in warranty.

The corporation pleaded a general denial, and averred that if the plaintiff ever had any title to the lot, he lost it by his neglect, because it had a claim thereon for eighteen dollars and sixty-five cents, due for taxes and other expenses, and caused suit to be instituted against the unknown owner, and an attorney was appointed to defend, when, after due proceedings had, a judgment was obtained, contradictorily, with him, in favor of the corporation ; and the lot in question sold at public sale, and adjudicated to C. Toledano, as the highest bidder, for one hundred and ninety-five dollars.

That if the plaintiff had an agent in the city, it was his duty to have made himself known during the time the lot was advertised to be sold. They then aver, that in case of eviction, they are only bound to refund the sum paid by Toledano ; and pray, in that case, that the plaintiff be adjudged to pay them the amount of their judgment against the owner of said lot, to wit, the sum of thirty-two dollars and sixty-five cents.

Upon these pleadings and issues, the cause was tried before the court and a jury.

The plaintiff produced his original title to the lot in question, and showed, also, that he had an agent in New-Orleans, in 1828, and that he paid taxes on other property situated there.

The record of the suit, and proceedings against the lot in question, had in the City Court of New-Orleans, before judge Préval, were offered in evidence by the corporation, called in warranty.

This suit was instituted by the corporation against "the vacant lot, No. 5, square No. 58, faubourg Annunciation, whose owner is unknown," for the sum of eighteen dollars and sixty-five cents, due for taxes and for digging ditches,

etc., in front of said property in the year 1828. An attorney was appointed to appear for the unknown owner.

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Joseph O. Ramos, syndic of this faubourg, testified that he had made diligent search to find out the owner of said lot and his agent, and that he could not find them. Judgment was given for the sum claimed and costs of suit. Under an execution issued on this judgment, the city marshal advertised and sold the lot in question, and C. Toledano became the purchaser, for the sum of one hundred and ninety-five dollars.

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The first section of the act, approved the 18th March, 1828, fixing "the mode in which town lots, etc., situated in the city of New-Orleans, etc., the owners of which are non-residents, may be seized and sold for the payment of taxes, etc., due to the corporation," *Provides*, "That whenever any sum of money shall be due to the corporation of the city of New-Orleans, by non-resident persons, who have no agent in this city, for city taxes and other expenses to which the said owners are subject, for the repairs of banquettes, paving, etc., it shall be lawful for the city treasurer, after having made due proof of the said debt before any competent tribunal, contradictorily with a person appointed by the said court to defend the said owner, to cause the city lots or other lands subject to the said taxes and other expenses, to be seized and sold in the manner hereinafter prescribed, without being bound to discuss the other property which the owner may have in the parish of New-Orleans, or elsewhere; *Provided*, that the said order of seizure and sale may be issued for any sum, even under one hundred dollars."

The second section provides that no sale shall be made until the property seized has been advertised three months in two newspapers, printed in New-Orleans, in English and French; that is three times in each month, and, also, on complying with the other formalities prescribed by law for the sale of real property seized.

The third and last section, gives the city courts jurisdiction of these cases, when the sums in contest are within their jurisdictional limits, etc.

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The district judge who presided at the trial, charged the jury, that in forced alienations of property, all the formalities prescribed by law must be strictly observed and complied with, to make such sales valid or binding on the owners of the property thus sold.

The jury returned a verdict for the plaintiff, that he is entitled to recover the property he claims; that Aikin's succession have judgment against Toledano, in warranty, for the sum of one thousand eight hundred and seventy-five dollars, the price the latter received; and as between Toledano and the corporation, that the former have judgment for twenty dollars.

From judgment confirming this verdict, the heirs and legal representatives of Aikin appealed.

L. C. Duncan, for the plaintiff. 1. The evidence sustains the plaintiff's claim; the notarial act attached to his petition having first established his title to the lot of ground described in his petition.

2. The law is with the plaintiff, whose evidence in the case shows he had an agent in New-Orleans, in the summer of 1828. See *Acts of 1828*, page 102; *Morris vs. Crocker*, 4 *Louisiana Reports*, 150; *Morris vs. Abat*, 9 *ibid.*, 552; 3 *ibid.*, 422, 425.

Preston, for the defendants and appellants, insisted, that the lot in question was properly sold to Toledano, according to law; being for taxes and other dues to the corporation of New-Orleans. See *Session Acts of March 18, 1828*, section 1.

2. The plaintiff had no known agent in New-Orleans, at the time of the institution of suit against this property, for the taxes, etc. The law authorized their proceedings to be carried on contradictorily, with an attorney, appointed to defend the unknown owner. *Ibid.*, section 1.

3. But even if the plaintiff had an agent, he cannot succeed in this court, without first instituting an action of nullity, to annul and set aside the judgment in favor of the corporation. *Code of Practice*, article 612.

4. The part of the judge's charge to the jury, that the act of March, 1828, applied to the property of persons, who were *known and absent*, was manifestly erroneous, and contrary to law. This act applies to all non-residents, known or unknown. The verdict and judgment should be set aside and reversed, and one rendered for the defendants.

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G. B. Duncan, for plaintiff, in reply. 1. In the proceedings before Judge Préval, under which the defendants claim title, the requisitions of law have not been complied with. The title of the suit is that of *The Mayor, etc., vs. Vacant lots and unknown owners*; not *absent* owners, as the law requires.

2. It is not stated in said proceeding, when said proceeding originated *non constat*; they may have originated before the promulgation of the act of 1828, and the claim may have originated before the passage of the act.

3. In said judgment it is not stated that the owner of said vacant lot was unknown to the plaintiffs in that suit, or to the city treasurer, but to the syndic of the faubourg Annunciation, and that said syndic had made inquiries for the owner and his agent, and *he* could not find them.

4. The advertisement required by the 2nd section of the act of 1828, is for the purpose of giving the absent defendant notice of the proceedings against him and his property; and of course his name should be stated; and more especially, should the advertisement and judgment give such description of the property as to attract the attention of the owner or his agent. In this case it was not so; and these very lots are numbered differently in the sale of one of the defendants, from the legal advertisement. *Code of Practice*, 671.

5. It does not appear that the property was ever appraised, or that it was otherwise advertised than in the newspapers. It should have been advertised at the court house door. *Ibid.*, 668.

Rost, J., delivered the opinion of the court.

On the 13th May, 1828, the plaintiff purchased, by nota-

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rial act, a parcel of ground situated within the incorporated limits of the city of New-Orleans, for the sum of fourteen hundred dollars; part of which, in 1828, was sold at the suit of the corporation, to pay eighteen dollars and sixty-nine cents, city dues, and was adjudged to the highest bidder, after the usual advertisements, for the sum of one hundred and ninety-five dollars.

The plaintiff now claims the part which was sold, alleging that he never parted with his title, and that he has not been legally divested of it.

The defendants and their warrantors claim title under the judicial sale, and the only question at issue is, whether that sale and the proceedings under which it took place were in due form of law. In the District Court the case was submitted to a jury, who gave their verdict in favor of the plaintiff; and judgment having been rendered in conformity therewith the defendants appealed.

The act of the legislature under which the defendants caused the parcel of ground in controversy to be sold, has already received the interpretation of this court, in the case of *Morris vs. Crocker*, 4 *Louisiana Reports*, 147, and it was then held, that purchasers under that act are bound to show that all the formalities required by it have been fully and faithfully complied with.

That statute authorizes the collection, in a manner which it provides, of the taxes and other sums due to the corporation by non-residents, who have no agents in the city. The district judge was of opinion, and so charged the jury, that the name of the non-resident owner must in all cases be given in the proceedings under that statute, and that the designation of an unknown owner was not sufficient to make them valid. We are of opinion the judge did not err. If the name of the owner had been known in this instance, the corporation would have known, also, that Kenny Laverty was his agent, and had paid taxes for him on other property, a few months before the institution of the suit by the corporation. So long as the owner was unknown, the court who tried the case had no means to ascertain whether he resided

In a sale for taxes due the corporation of New-Orleans, by non-resident owners of lots, the name of the owner must in all cases be given and published in the proceedings. The designation that the owner is unknown, is insufficient to make such sales valid.

here or elsewhere. The judgment states, that it was proved by Joseph O. Ramos, syndic of the faubourg, that he, Ramos, had used every diligence in his power, to find out the owner or his agent, without being able to succeed. This does not prove that the owner was a non-resident. The judgment rendered against him, as such, is not in conformity with the statute, and cannot sustain the title of the defendants. This judgment is defective in other respects less important. It does not state that the debt upon which the corporation sued was proved, although the law expressly requires it should be, contradictorily with the attorney appointed to represent the absentee. The designation of the lot, as *number 5, square number 58, faubourg Annunciation*, is insufficient. The street upon which lot number 5 fronts, the lateral streets of square 58, and, as far as practicable, the extent and boundaries of the lot ought to have been given. The object of the law, in directing that the property sold under this act shall be advertised three months, is to bring the fact of the seizure to the knowledge of the absent owner; but how could he recognize his property, under the designation of number 5, in square 58. The dimensions and situation of the lot are also necessary, to enable the bidders at the sale to know what they are buying, and this case furnishes a striking instance of the loss to which absent owners may be subjected, by the omission of that formality.

We are of opinion that the judgment of the District Court ought to be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs in both courts.

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April, 1839.

CARMICHAEL

vs.

ATKIN'S HEIRS.

The debt or corporation tax due by non-resident owners of lots, must be proved, contradictorily with the attorney appointed to represent the absentee, and must be so stated in the judgment.

In a forced sale for taxes of lots in the city, it is insufficient to designate the lot by its number, and that of the square it is in. It should be described, and its extent and boundaries given.

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PARK vs. PYNE ET AL.

PARK
 vs.
 PYNE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
 PRESIDING.

In the oath or affidavit for the arrest of a debtor, the affiant must swear from his *personal and direct* knowledge, that the debt is due and unpaid, and not from what he may have learned or knows from others.

This is an action on several promissory notes, amounting to six hundred dollars, signed by Pyne & Huntington. The defendants were arrested on an affidavit of the plaintiff's agent, and took a rule on the plaintiff to show cause why the order of arrest should not be set aside on the insufficiency of the affidavit. Gallway, the agent, swears that the defendants are indebted to the plaintiff in the sum of six hundred dollars, which sum is now due; and that they are about departing from the state, without leaving in it property sufficient to satisfy this demand, etc.

On the trial of the rule, Gallway was called as witness, and stated that he knew nothing of the indebtedness of the defendants to the plaintiff, but through the representation of the latter, by letter, and the possession of the notes sued on. He is not acquainted with the signatures of the defendants.

On this evidence, the district judge made the rule absolute, and set aside the order of bail. The plaintiff appealed.

Elmore and *King*, for the plaintiff, contended, that the district judge erred, in receiving evidence to contradict or vary the tenor of the affidavit. It was sufficient, of itself, to authorize the order of arrest, and its terms cannot be varied or contradicted by parole testimony.

2. The affidavit is in positive terms, and states absolutely the indebtedness of the defendants. The affiant was satisfied of the fact, and swore positively, and not that he derived his knowledge from this or that source, or from any particular individual. All knowledge is derivative, and if one is informed of the existence of particular facts, from authentic sources, so as to produce conviction on the mind, the knowledge of them is his own.

Chinn, contra.

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Eustis, J., delivered the opinion of the court.

Gallway, the plaintiff's agent, made an affidavit, upon which the defendants were arrested.

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vs.
PATTON.

On a rule to show cause why the order of arrest should not be set aside, Gallway declared that he knew nothing of the indebtedness of the defendant, except from the representation of the plaintiff, by letter, and the possession of the notes sued on, the signatures to which he is unacquainted with.

The article 215 of the Code of Practice requires, on the part of the person making the oath for the arrest of a debtor, *personal and direct* knowledge of the debt's being due: the oath of the agent, based on what he may know or have learned from the creditor, is expressly declared to be insufficient.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.



NICHOLSON, TUTOR, ETC. vs. PATTON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
WATTS PRESIDING.

An agent is a competent witness for his principal in all cases, except where suit is brought against the principal, on account of the negligence of the agent.

So, in an action for the recovery of a lost note against a broker, who bought it of a notary's clerk, the notary was received as a competent witness, to prove that his clerk had purloined the note from his office and sold it to the defendant, notwithstanding he was the agent employed to demand payment.

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NICHOLSON
vs.
FATTON.

In an action for the recovery of a lost note, when the fact of the loss is proved, the defendant must show that he came in possession of it in the regular course of trade, and that he acquired it in good faith, and for a valuable consideration.

When a note is taken by a broker, under circumstances affording reasonable ground of suspicion, he should inquire if the party came by it honestly; and if he takes it under these circumstances, with a view to his profit, it is at his own risk.

This is an action to recover the possession of a promissory note of two thousand four hundred dollars, drawn by F. Frey, and endorsed by Schmidt & Longer, alleged to be in the hands of the defendant, and wrongfully claimed and detained by him. The plaintiff alleges, that the note is owned by the minor children of the late Samuel Spotts, of whom he is the tutor, and that he is entitled to demand the possession or its proceeds, for which he prays judgment against the defendant accordingly.

The defendant pleaded a general denial, and averred, that true it was he had the note in his possession, but was the lawful proprietor, having received it in the regular course of trade, in good faith, and for a valuable consideration.

Upon these pleadings and issues the cause was tried before the court and a jury.

Wm. Christy, Esq., the notary public, with whom the note in controversy was deposited by the plaintiff, testified, that in May, 1835, shortly after the note was executed, he ascertained that it was missing from his office, together with one other. He immediately advertised them in two of the newspapers. He soon discovered that W. Finney, his leading clerk, took the note and pledged it to the defendant, who lent him the sum of one thousand two hundred dollars, which sum was to have been returned by Finney, and the note taken up in a few days. These facts in relation to the pledge, witness had from the defendant himself, who called on him about two days after the note was advertised.

Witness produced a letter to him from Finney, dated at Mobile, the 15th of May, 1835, acknowledging that he had taken this note, which was for two thousand four hundred

dollars, payable the 15th of January, 1836, and pledged it to the defendant for one thousand two hundred dollars, with the intention of redeeming it, but that his misfortunes prevented him.

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NICHOLSON
vs.
PATTON.

All this testimony was objected to by the defendant's counsel, but was received by the court, and a bill of exceptions taken.

The advertisement of the notes was put in the papers by the notary, the 27th of May, 1835. The plaintiff made full proof of the loss of the note, and that it was duly advertised. The defendant admitted he had received it, but that he had discounted or purchased it in due course of business for the sum of one thousand two hundred dollars.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

Pierce, for the plaintiff.

J. Slidell, for the defendant.

Rost, J., delivered the opinion of the court.

The plaintiff, tutor of certain minors, claims from the defendant, in their behalf, a promissory note of two thousand four hundred dollars, which was lost or mislaid, while in the possession of W. Christy, acting as the plaintiff's agent.

The defendant admits the possession of the note, but avers that he is the lawful proprietor thereof, having purchased and received the same in the regular course of trade, in good faith and for a valuable consideration. The jury gave a verdict against the defendant, and his motion for a new trial being overruled, judgment was rendered, and he appealed. During the trial, a bill of exceptions was taken to the opinion of the court, admitting W. Christy as witness, on the ground, that he was the depository of the note, and was responsible for the act of Finney, his clerk, who had purloined said note as stated by W. Christy, on his *voir dire*. The question, how far an agent can be a witness in matters connected with his agency, and involving his responsibility,

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vs.
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An agent is a competent witness for his principal in all cases, except where suit is brought against the principal, on account of the negligence of the agent.

So, in an action for the recovery of a lost note against a broker, who bought it of a notary's clerk, the notary was received as a competent witness, to prove that his clerk had purloined the note from his office, and sold it to the defendant, notwithstanding he was the agent employed to protest it.

In an action for the recovery of a lost note, when the fact of the loss is proved, the defendant must show that he came in possession of it in the regular course of trade, and that he acquired it in good faith, and for a valuable consideration.

When a note is taken by a broker, under circumstances affording reasonable ground of suspicion, he should inquire if the party came

has repeatedly been submitted to the decision of this court, and the rule settled by their decision and recognized by the courts of the other states, appears to be, that an agent can be a witness in all cases except in such as are brought against the principal, on account of the negligence of the agent; in all such cases, he cannot be a witness for the principal. *Practical Abridgment of Common Law Cases*, vol. 8, page 432. The present action does not come within that exception; and the fact to be proved is one, for the proof of which, from the necessity of the case, the law is satisfied with an inferior degree of evidence.

Articles 2258 and 2259 of the Louisiana Code, provides, that the loss of written instruments containing obligations may be proved by such circumstances, supported by the oath of the party, as renders the loss probable, provided it has been advertised within a reasonable time. In this case the advertisement is shown. The defendant admits that the note exists in his possession, and if under these circumstances, the oath of the owner would be legal evidence of the loss, we do not see upon what grounds that of his agent could be excluded. We are, therefore, of opinion, that the testimony was properly admitted.

The introduction of a letter of Finney as evidence, was also excepted to by the defendant. We deem it unnecessary to notice it; the letter only went to show the manner in which the note was lost, and how it came in the possession of the defendant. Those facts do not appear to us material to the issue.

The fact of the loss being proved, the defendant must show that he came in possession of the note in the regular course of trade, and that he acquired it in good faith and for a valuable consideration; for we take the rule as settled in England, in the case of *Gill vs. Cubitt et al.* for our guide; when a note is taken by a broker, under circumstances affording reasonable grounds of suspicion, questions must be asked and inquiries made, whether the party from whom it is received, came by it honestly or not, and if the broker takes it under those circumstances, with a view to profits arising from inte-

rest or commission, or merely because the names upon it or some of them are good, then he takes it at his risk, or what ought in the contemplation of a reasonable man to be a risk, whether it be stolen or not, he takes it at his peril. In that case, one of the judges said, after commenting upon the evidence, "I think those circumstances tend strongly to show that the party who discounted the bill, did not choose to make inquiry; but supposing the questions might not be satisfactorily answered, rather than refuse to take the bill, took the risk, in order to get the profit arising from commission and interest." 3 *Barnewall and Cresswell's Reports*, 466.

In the present case, Finney was, to the knowledge of the defendant, a notary's clerk, without any apparent means. The note was one given in pursuance of an act passed before his employer, and was signed by him *ne varietur*. Both drawer and endorser were men with whom Finney was not known to be in the habit of dealing, and it was taken by the defendant without asking any questions. A broker testifies that it is not usual to ask questions on those occasions, but that under the peculiar circumstances of this case, if the note had been offered to him, he would have ascertained how Finney came by it, before discounting it. Another broker testifies, that he refused some time before to take a note of the same kind offered him by Finney. The defendant told one of the witnesses, shortly after the disappearance of Finney, that he had taken the note from him on pledge, for a loan of twelve hundred dollars, which the borrower had promised to refund in a few days, when the note was to have been returned to him. Pickrell, the clerk of the defendant, swears that the defendant gave Finney a check for twelve hundred dollars, and placed the note in his strong box; that witness being the book-keeper of the defendant, asked what he was to do with the note, when the defendant replied, that he had given Finney twelve hundred dollars, and there was the note in the box. That the note thus remained without being entered in the books of the defendant as his own, up to the time of the departure of the witness for the north.

It is proved on the part of the defendant, that Christy had,

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by it honestly,
and if he takes
it under these
circumstances,
with a view to
his profit, it is
at his own risk.

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PEYROUX ET AL.

at various times, endorsed notes of small amounts for Finney, which had been discounted in the market, and it is shown that he was his confidential clerk. Brokers testify, that it frequently occurs, that only part of the proceeds of notes discounted are paid the first day, and that the calculation of interest and of the balance due, are left for further settlement; those transactions are not generally entered upon the books until their termination.

We do not think that these circumstances tended materially to diminish the grounds of suspicion which the peculiar situation of Finney and the nature of the paper he offered were calculated to inspire, nor does it affect the declaration of the defendant that he took the note in pledge. We are of opinion, that the judgment of the District Court ought to be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

RAPP VS. PEYROUX, ET AL., NO. 12,784.

SAME VS. RIVARDE, NO. 13,138.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.

A separation from bed and board by the tribunals of France, does not remove the wife's incapacity to sue, without the authorization of her husband.

The plaintiff, Henriette Catharine Rapp, separated from bed and board from her husband, J. B. Guerin, sues to recover from the firm of Peyroux, Rivarde & Co., the sum of two thousand two hundred and twenty-four dollars, the amount of a note which she alleges her husband put into

their hands for collection, the 7th June, 1833, when she and her husband were on the eve of starting for France.

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The plaintiff alleges that this note was her separate and paraphernal property, and that she alone is entitled to receive the proceeds thereof. That in a judgment and act of separation, rendered in 1834, by the tribunals in France, between her and her husband, he acknowledges this note to be her own separate property. She, therefore, prays judgment, etc.

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VS.
FRIEBOUX ET AL.

The defendant Rivarde, answered separately, and admitted the firm had collected the amount of the note mentioned, and that the proceeds was in their hands, and that it belonged to her husband in France, and not to her. He further averred, that he had purchased seven slaves from her and her husband, when they were about leaving this state for France, in June, 1833, for the sum of two thousand five hundred and fifty dollars, and that she had since demanded them to be returned to her, as having been illegally sold, being her dotal property, and he was in danger of eviction; wherefore, it became necessary to hold this money to indemnify him in case suit was instituted and the slaves recovered from him. He then sets up a claim for indemnification, etc., and calls in the husband to ratify the sale of the slaves; and prays that the suit be dismissed.

The other defendants pleaded a general denial, and adopted the answer of Rivarde.

The plaintiff also instituted her suit against Rivarde for the slaves, alleging that she brought them in marriage, and that they were constituted her dotal property, which she was unauthorized and incapacitated to alienate.

The defendant pleaded a general denial, and averred that it became absolutely necessary for the plaintiff and her husband to sell the slaves in question, when they were about to remove to France, in June, 1833, and that he purchased them at their special request, in good faith; the husband warranting the sale and title, etc. That the sale has been ratified by the plaintiff since she was separated in bed and board from her husband, and made capable of contracting for her dotal and paraphernal rights, and, also, of alienating them, by receiving the price of said slaves from her husband.

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HAPP

VS.

PETROUX ET AL.

The defendant prays for judgment, and that J. B. Guerin, the husband, residing in France, be served with a copy of these proceedings, and an attorney appointed to correspond with him and to defend this suit; and that in case of recovery by the plaintiff, that judgment be rendered over against him for the value of the slaves, with damages and costs.

These two suits were consolidated and tried together.

There was judgment for the defendant, Rivarde, in the suit for the slaves. The plaintiff had judgment against the defendants for the proceeds of the note, etc. From the final judgment rendered in these consolidated cases, the plaintiff appealed.

D. and J. Seghers, for the plaintiff.

Canon, for the defendants.

Rost, J., delivered the opinion of the court.

These cases were consolidated and tried together in the court below. Judgment was given in favor of the plaintiff in the first suit, and against her in the second; from that part of the judgment, she has appealed. This action is instituted to recover certain slaves formerly sold by the plaintiff, on the ground that they formed part of her dowry and could not be alienated. Her husband, cited in warranty by the defendant, has appeared and denied the authority of the plaintiff to appear in court. It is in evidence that she resided several years in France with her husband, and was separated from bed and board by the tribunals of that country; her incapacity did not cease thereby, and we are of opinion she cannot maintain her present appeal.

The case, No. 12,748, is not before us, and cannot, therefore, be affected by our judgment. In the case, No. 13,138, it is ordered, adjudged and decreed, that the appeal be dismissed with costs.

STATE OF LOUISIANA *vs.* JUDGE BERMUDEZ,

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April, 1839.

ON AN APPLICATION FOR A MANDAMUS.

STATE
VS.J^{ES} BERMUDEZ

When a foreign will, duly authenticated and admitted to probate in the country of the testator's domicil, is presented for registry in a parish of this state, and no dative testamentary executor is asked for, and it not appearing that there are any creditors, heirs, or legatees here, and the property is moveable, the judge of probates in such cases is bound to admit the registry and execution of the will, without any other form than that of registry.

This case comes before the court on an application for a *mandamus* to the judge of probates for the parish and city of New-Orleans, commanding him to order the execution and registry of the will of Robert Wardlaw Ramsay, deceased, late a resident of Great Britain, which was made and duly authenticated and admitted to probate in that country.

Ambrose Lanfear, resident in New-Orleans, appeared and made affidavit that he was the attorney in fact of Messrs. John Wardlaw, Alexander Pringle, and John Smith Cunningham, all residents of Great Britain, and in their behalf presented the following petition for a *mandamus* :

“ That Robert Wardlaw Ramsay, also a resident of Great Britain, died in England, leaving his last will and testament duly executed, whereby he appointed these petitioners his testamentary executors ; that said will has been duly proved before a competent judge of the place where it was received, and that a duly certified and authenticated copy of said will and probate has been delivered to petitioners by the competent tribunal aforesaid.

Petitioners further aver, that although said deceased was a resident of Great Britain, aforesaid, and although his principal estate and fortune were in that country, was possessed of certain shares of the capital stock of the Louisiana State Bank, an incorporated institution of this state, established in the city of New-Orleans, and that not only by the terms of said will, but also by the established law of Great Britain, the country where it was made, the property in said stock became vested in petitioners, who have a title thereto.

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STATE
VS.
JOS. BERMUDEZ

Petitioners further show, that by the laws of this state it is provided, that testaments made in foreign states cannot be carried into effect on property in this state, without being registered in the court within the jurisdiction of which the property is situated, and the execution thereof ordered by the judge ; (*Louisiana Code, article 1681 ;*) and that in compliance with the law, and in order to obtain said stock, they made application to the Court of Probates, in and for the parish and city of New-Orleans, where said property is situated, for an order for the registry and execution of said testament, and did annex to the petition to said court, a duly authenticated copy of said will, and of the probate thereof.

Petitioners aver, that judge J. Bermudez, the judge of said court, refuses to give the order, which by law he is bound to give, for the execution and registry of said will, but declares that he will give no such order, without coupling with it a further order appointing dative testamentary executors, which further order, if given, would in reality annul that which by law he is bound to give, and render it nugatory, and would subvert and prevent the execution of the will, instead of aiding it, as the law requires.

Petitioners, therefore, humbly pray your honorable court to issue an order to the said judge Bermudez, directing him to give an order for the execution and registry of said will, as provided for in article 1681 and 1682 of the Louisiana Code, and without imposing any conditions, nor requiring any formalities not provided for in said two articles of the Code ; or that the said judge Bermudez show cause to the contrary, within a certain time, to be fixed by this court, and that the court will grant such other order in the premises as justice may require.

A rule was taken on the judge of probates, ordering him to grant the prayer of the petitioners, or show cause to the contrary.

The judge showed for cause ; " 1st. That a final decree was rendered in this case on the 24th December last, (1838) and signed by me on the 22d March instant, (1839,) from

which decree I have always been, and am still ready to grant an appeal; it being, in my opinion, the only remedy the applicants are entitled to. The decree reads as follows: 'It is ordered, that the accompanying duly certified copy of the last will and testament, and the documents and certificates thereto annexed, be registered, homologated, and carried into execution. And, inasmuch as the testamentary executors in said will named, reside permanently out of the state of Louisiana, to wit, in the kingdom of Great Britain, it is ordered, that Christopher Adams, junior, be appointed dative testamentary executor of the deceased Robert Wardlaw Ramsay, upon his complying with all the legal requisites of the law.'

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JOS. BERNHARDT

2. I answer next, that the above decree was rendered by me in conformity with the settled jurisprudence of the state, as evinced by the repeated decisions of the supreme court, in the cases of *Berluchaux vs. Berluchaux et al.*, 7 *Louisiana Reports*, 539; 8 *Louisiana Reports*, 84; 9 *Louisiana Reports*, 234; to which cases I call the attention of this honorable court, expressly denying to the applicants the right of restricting me to the two articles of the Louisiana Code by them quoted, as if the whole compass of the laws and jurisprudence of this state was not open to me."

Upon this issue the court pronounced the following judgment, making the rule absolute.

Benjamin and Grima, for the application.

Eustis, J., delivered the opinion of the court.

In this case we granted a rule on the judge of the Court of Probates, to show cause why he should not grant an order for the registry and execution of the will of the deceased, as provided in articles 1681 and 1682 of the code.

It is stated, in the petition, that the will was made in England, and has been admitted to probate there; that a copy duly authenticated of the will and probate thereof, has been presented to the judge of the court of probates by the

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J'GE. BERNUDEZ

petitioners, who are the testamentary executors, with a prayer for an order for the execution and registry of the will.

They allege, that the judge refuses to give an order for the registry and execution of the will, without coupling with it an order for the appointment of a dative testamentary executor. They pray for a *mandamus* to the judge of the Court of Probates, commanding him to give an order for the registry and execution of the will, absolutely and unconditionally.

The rule was served on the judge of the Court of Probates, on the 21st of March last.

The judge, in answer to the rule, states, that a final decree was rendered in this case on the 24th of December last, and signed on the 22d of March instant, from which he has always been ready to grant an appeal, which he considers to be the only remedy the applicants are entitled to. It appears that the decree of registry and execution was accompanied with an order appointing Christopher Adams dative testamentary executor of the deceased, on his complying with the requisites of the law.

It does not appear that any application was made to the Court of Probates for the appointment of a dative executor, by a creditor or any person having an interest in the estate ; nor does it appear that there are any creditors, heirs, or legatees of the testator in the state ; and it is not denied that his domicile was in the kingdom of Great Britain, nor that the property of the succession within the jurisdiction of the court is moveable.

We are bound to consider the decree of the Court of Probates of the 24th of December, and signed on the 22d of March, after the service of the rule, as a nullity. The rule is made absolute. The judge of the Court of Probates is commanded to order the registry and execution of the will, without any other form than that of registry.

VANCE vs. TOURNE AND BECKWITH.

EASTERN DIST.

April, 1839.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.VANCE
vs.
TOURNE ET AL.

In commutative contracts it is the duty of the party claiming damages for non-performance, to show that he offered to perform his part, at the time implied in the contract, and that he has put the adverse party in default. This is a pre-requisite to the recovery of damages.

18	225
115	836
13	225
122	73

The damages at the time of the default or breach of the contract, are the only damages that can be recovered.

In an action by the vendee, for the breach of a contract of sale by the vendor, in not delivering the article, the measure of damages is the *price* of the article *at the time* of the breach of the contract. *Shepherd et al. vs. Hampton, 3 Wheaton, 200.*

The facts and pleadings in this case, are fully stated in the following opinion and judgment, of the district judge who presided at the trial :

"This is a suit for non-compliance with a stock contract. The petition alleges that Tourné & Beckwith are indebted to Vance in two thousand eight hundred dollars for this : that on 24th June, 1834, Vance purchased from Tourné & Beckwith, four hundred shares of Mechanics' and Traders' bank stock, at twenty-six dollars per share for thirty dollars paid. That Vance is, and was always, ready to pay the price, but that Tourné & Beckwith refused to comply with their contract, as the stock was rising in the market, and although Vance was always insisting on his contract, they have refused. That twenty dollars per share has since been paid on the contract, and Tourné & Beckwith have since sold the four hundred shares so belonging to petitioner, Vance, for fifty dollars per share ; and Vance claims the seven dollars per share profit. This petition was filed on 9th July, 1835, more than one year after the alleged contract.

"The answer is a general denial.

"It appears that on 24th June, 1834, Tourné & Beckwith signed a memorandum, by which they say : ' We have sold to J. Kilty Smith four hundred shares of Mechanics' and

EASTERN DIST. Traders' bank stock, upon which thirty dollars has been paid,
April, 1839. at twenty-six dollars per share for the thirty.'

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"It also appears that Smith was the broker of Vance; that on the stock generally, on 24th June, 1834, the full share of fifty dollars was paid up, but that Tourné & Beckwith were in default for twenty dollars of instalments.

"I also consider that twenty-six dollars per share for thirty dollars paid, was on 24th June, 1834, the correlative value of forty-seven dollars for fifty dollars paid; and that these were the market prices of the stock; the thirty dollar stock not being entitled to dividend, was proportionally of less value than the fifty dollar stock.

"The cashier and president of the bank refused to allow of the transfer, having taken a pledge of the stock for money borrowed on it; but with a clause similar to that which has been declared illegal, in the case of *The Syndics of Yard & Blois vs. The Mechanics' and Traders' Bank*. This debt and the remaining instalments were to be paid by Vance at the time of transfer, but Tourné & Beckwith had other engagements with the bank, in which the bank had vested the stock.

"Vance, through Smith, made a written demand of the stock shortly afterwards, but at what date in particular, Smith is unable to prove; nothing further was done by Tourné & Beckwith, nor by Vance; the terms of this demand in writing, are not proved. Vance instituted this suit, as we see, a year after the agreement.

Vance proves that Tourné & Beckwith sold four hundred shares of Mechanics' and Traders' Bank, on 4th February, 1835, at fifty-two dollars and fifty cents for fifty dollars paid.

"Notwithstanding the very ingenious and specious way in which the petition is drawn, this action is and can be no other than an action for non-fulfilment of a stock contract. As there was no future time fixed for delivery or transfer of the stock, it was to be delivered and transferred immediately, and if Tourné & Beckwith did not immediately transfer the stock, Vance had a right to go into the stock market and buy an equal quantity, and, if he had paid higher for it, Tourné & Beckwith were bound to pay the difference.

"The rule of damages in all cases where the non-fulfilment of contracts resolves itself into damages, is the amount of that damage at the time when the contract is broken ; and in stock transactions, it is susceptible of exact measurement. I consider this rule so much of an elementary principle, that I do not find it necessary to cite authorities for it. There is a time fixed when the damages are to be computed, and that time is the moment when the contract was violated; neither party is to be subject to the consequences of the fluctuations of the price of the article. If the contract had been for a future time and the price had fallen, Vance could not be compelled to pay, as difference, any thing more than at the rate of price at which the stock could be sold at the time fixed for delivery ; nor *vice versa*, as buyer, could he claim more.

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"If for ten days after the 24th June, 1834, Vance could buy the same stock at the same price, it would be difficult to say he had suffered any damage.

"A memorandum has been furnished of the price current rates of this stock, from which it appears that up to 12th July, 1834, the price of the stock remained the same as on the 24th June, 1834 ; and if Vance meant to supply himself with stock at the cost of difference, it ought to have been done within that time. It appears to me that the contract was broken as soon as made, in consequence of the obstacles opposed by the bank to the transfer of the stock ; and as Vance could for some days after have supplied himself with stock at the same price, I cannot perceive that he has suffered any damage, and he can take nothing by his suit, it is *injuria absque damno*.

"It is, therefore, considered, that there be judgment for the defendants, and that the plaintiff pay the costs of suit."

From this judgment the plaintiff appealed.

L. Peirce, for the plaintiff and appellant. If the plaintiff and defendants had agreed through the broker upon the number of shares of stock and the price, the sale was complete ; there was no necessity for delivery to perfect it. *Louisiana Code, article 2431.*

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2. If the sale was complete, the four hundred shares belonged to the plaintiff, and not to the defendants.

3. If the defendants sold these shares, they sold the property of the plaintiff, and must pay him what they received for the sale of his property.

4. It was not the plaintiff who was to put the defendants *in morâ*; it was the latter who should have put Vance, the plaintiff, before they could have a pretence of ownership of the property sold.

D. and J. Seghers, contra.

Eustis, J., delivered the opinion of the court.

The petitioner alleges, that on the 24th of June, 1834, he purchased from the defendants four hundred shares of the Mechanics' and Traders' Bank stock; that he has always been ready to pay the price, and has offered to do so, but that the defendants refused to comply with their contract, as the stock was rising in the market, and to deliver said shares of stock, although the plaintiff has continually insisted on the delivery of the same; that the stock was afterwards sold by the defendants, at a sum exceeding by twenty-eight hundred dollars the price agreed to be paid by him, which amount is said to have been lost to the plaintiff, by the non-compliance with their contract on the part of the defendants; for this amount suit is brought.

The defendants pleaded the general issue; there was judgment for them, and the plaintiff has appealed.

The defendants on the 24th of June, 1834, sold to John K. Smith, four hundred shares of stock as charged in the petition. On the fourth of February, 1835, they sold the stock to Beers, St. John & Co. at a large profit above the price to be given for the stock at the first sale.

Smith, who was a broker, says in his examination, that he purchased the stock on account of plaintiff, and disclosed his principal to the defendants immediately after the sale. On the day of the sale, he thinks, he went with one of the defendants to the bank, and the president of the bank refu-

sed to permit the transfer to be made, as the stock was pledged, and he believes he said to the defendant that the delay occasioned by the bank refusing to make the transfer would be a matter of no consequence. He afterwards spoke to the defendants, but does not recollect the time; thinks it was during the summer; stated to them that plaintiff was urging him to have the transfer made. He recollects having written a note, which was delivered to the defendants, about the transfer, but does not recollect at what time; says it was not so long as twelve months after. He has frequently told the defendants that the plaintiff held the defendants responsible. Plaintiff has constantly urged his claim to the stock.

Assuming all these facts to be true, we think the plaintiff cannot recover. It was his duty to have put the defendants in default. In commutative contracts, this is a "pre-requisite to the recovery of damages." He ought, at the time implied in the contract, to have offered to perform that which on his part was to be performed. *Louisiana Code, articles 1906, 1907, 1908.*

On a contract like this, the damages at the time of the default, or the breach of the contract, are the only damages which the plaintiff can recover. *3d Wheaton, 200.*

We have before us memoranda of the value of the stock of this bank for several months after this transaction, and admitting that the defendants were put in default, as the time of the default which ought to have been fixed is entirely uncertain, we cannot determine that the plaintiff suffered any damage which did not result from his own neglect, in not taking proper measures at a proper time, for the enforcement of his contract.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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In commutative contracts, it is the duty of the party claiming damages for non-performance, to show that he offered to perform his part, at the time implied in the contract, and that he has put the adverse party in default. This is a pre-requisite to the recovery of damages.

The damages at the time of the default or breach of contract, are the only damages that can be recovered.

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13	230
45	407
131	230
46	345
13	230
109	654
13	230
112	789
112	795
13	230
116	509
13	230
121	413

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE
PARISH OF TERREBONNE, THE JUDGE OF THE FOURTH PRESIDING.

No physical act, in taking possession, is necessary under a sale by notarial act. The intention of the purchaser, which the law presumes, coupled with the power which the act of sale gives, vests the possession in him. The *right* is taken for the fact, and the buyer is seized of the thing corporally by the execution of the title.

There is but one kind of possession known to the law, which commences by the corporal apprehension of the thing, or the signing of the title which transfers it; and continues, whether or not the possessor actually occupies and detains the thing, until he is disturbed in fact or in law.

The Louisiana Code contains definitions, and points of doctrine, as well as positive legislation; and whenever there is any inconsistency in its provisions, the court will disregard the doctrine, and consider the definitions modified by the clear meaning of the positive enactments.

So, all possessors, who have had possession quietly and without interruption, by virtue of one of the titles prescribed in the 47th article of the Code of Practice, for more than one year, previous to being disturbed, can maintain a possessory action; and the possession of less than one year is sufficient, in case of eviction by force or fraud.

This is a possessory action. The plaintiff alleges he is the owner of a tract of land lying and fronting on both sides of the bayou Caillon, in the parish of Terrebonne, containing one thousand eight hundred and ninety-three superficial arpents, more or less, with specific boundaries which he sets out; and which he acquired by purchase from John Hutchins, by notarial act, passed on the 28th June, 1836. That this tract is part of a larger one, confirmed by congress, in the name of Charles Jumonville Devillier, under whom the vendor of the plaintiff in this case held, by a title translatif of property.

The plaintiff further shows, that his vendor, and those under whom he held, had the actual possession of this tract of land, and that, in virtue of his purchase, he became the legal possessor thereof, and continued to possess the same until some time in the year 1837, when Ursin Prevost, and

others, disturbed him, by making forcible opposition to the construction of new works, improvements, etc., which he was attempting to make and put thereon, and that they still continue their forcible opposition, without any legal title or pretensions to the right of possession of said land, to his damage five thousand dollars. He prays judgment, decreeing him the possession of his land, and quieting him therein, and for his damages.

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The defendants pleaded a general denial, and alleged possession in themselves, and through their ancestor from whom they derive title, since the year 1790; and that they have been in the peaceable, open, and uninterrupted possession of the premises, for more than a year prior to instituting this suit. They set up title by inheritance, and plead the prescription of ten, twenty, and thirty years, as owners and possessors in good faith; and pray to be quieted in their title and possession, and that this suit be dismissed.

Upon these pleadings and issues, the parties went to trial, and the cause was submitted to a jury.

In the progress of the trial, the plaintiff offered to produce his title to the land in controversy, in evidence, which was objected to by the counsel of the defendants, on the ground that in an action purely possessory, titles could not be admitted as evidence, either for the purpose of showing the extent of the claim, or of connecting the plaintiff's possession with that of his author; unless it be first shown that the plaintiff had actual possession of some portion of the land in dispute, and that the extent only of that possession was in dispute. The court admitted the title in evidence, to show the extent of the plaintiff's possession. The defendants took their bill of exceptions.

On the whole evidence of the case, after the explanations and arguments of counsel, the jury returned a verdict for the defendants. From judgment rendered thereon, the plaintiff appealed.

Miles Taylor, for the plaintiff. 1. The vendor of plaintiff had the real and actual possession of the land in question, as

EASTERN DIST. owner, from the year —, until he transferred the possession
April, 1839. to the plaintiff. *Louisiana Code, 3389, 3391, 3401, 3405,*
3406, 3400. 7 Martin, N. S., 122.

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2. In virtue of the transfer to him, the plaintiff took the place of his vendor, and succeeded to his possession ; and, as the legal possessor, is now entitled to be sustained in the possession of the entire tract of land, and to be quieted therein. *Louisiana Code, 3522, number 29, 3460, 3417, number 2.*

3. The defendants acknowledged an owner, and could not acquire the legal possession of the land, or of any part of it. *Louisiana Code, 3404, 3409, 3456. Starkie's Evidence, volume 2, pages 25 and 26. Louisiana Code, 2076, 2109, 2112, 3517. Napoleon Code, 2249. 2 Troplong, number 628.*

4. If the defendants have a right to the possession of any part of the land, then their right cannot extend beyond that possessed by enclosures, for more than one year before the institution of the plaintiff's action. *Louisiana Code, 3417, number 2. Code of Practice, 49. 9 Martin's Reports, 174.*

Roman and Beatty, for the defendants.

Rost, J., delivered the opinion of the court.

This is a possessory action. The defendants have pleaded the general issue, and the possession of one year as owners. The case was tried by a jury, who gave a verdict in favor of the defendants, and after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

The plaintiff claims possession of the land, under a sale by notarial act, made to him in 1836, by a person who himself purchased the land in 1829, and who since occupied and cultivated a part of it, for more than one year. The plaintiff has never resided upon the land, and has abandoned the improvement made by his vendor. The defendants have occupied and cultivated, for several years, an inconsiderable part of the land in controversy, but they show no possession according to metes and bounds of that which is unenclosed, and some of the witnesses say, that the ancestor to whose possession they have succeeded, acknowledged to them that

the land belonged to Jumonville Devillier, under whose conveyance the plaintiff claims possession and holds title. A much greater number of witnesses state, that the defendants' ancestor, and themselves, possessed as owners. The plaintiff has made the following points in this court :

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1. That he has the right to join his possession to that of his author, and that he is in actual possession since 1829.

2. That the defendants never could acquire possession, because their ancestor did not possess as owner.

3. That if they are entitled to the possession of any part, it is only of that which is enclosed.

The defendants answer, that the plaintiff has no capacity to complain of the judgment, because he had no right of action originally ; his being a mere civil possession, insufficient to maintain an action under the 49th article of the Code of Practice. This ground of defence must be first considered, for if it should be maintained, it would put an end to the case.

The 49th article of the Code of Practice provides, that in order that the possessor of real estate, or of a slave, or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required—

1st. That he should have had the real and actual possession of the property, at the instant when the disturbance occurred. *A mere civil or legal possession* is not sufficient.

2d. That he should have had that possession for more than one year before the disturbance, quietly and without interruption.

The distinction between civil and natural possession, has been one of the cardinal uncertainties of the jurisprudence of modern times, and this arose from the fact, that it was peculiar to the Roman law, and that with us it is a distinction without a difference. By the law of the twelve tables, the Roman citizen who had possessed lands during two years, and moveables during one year, became the irrevocable owner of them, by a mode of acquisition called in the language of the law *usu captio*. Civil possession, was that which united all the requisites of the law, for that mode of

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acquiring property ; and it was so named, on account of the peculiar effects which the civil or national law, emanating from the twelve tables, attributed to it. All other possessions were held to be of an inferior degree, and were called, in contra-distinction, natural. The *usu captio* was not retained in the institutions of modern nations, but the commentators of their laws preserved the verbal distinction, after the foundation upon which it rested had ceased to exist, and created thereby great confusion and uncertainty ; almost each of them adopted a different definition, and drew from them different and adverse doctrines.

The jurists who prepared our codes, to make assurance doubly sure, have made the legislature give us two definitions of civil possession, instead of one, and those two definitions are contradictory, and alike inconsistent with the textual dispositions of our laws on the subject of possession.

Article 3392 of the Louisiana Code, defines civil possession to be, when a person ceases to reside in the house or on the land which he occupied, but without intending to abandon the possession. Article 3394 says, on the contrary, that civil possession is the detention of a thing by virtue of a just title, and under the conviction of possessing as owner.

To which of these two definitions does the 49th article of the Code of Practice refer ? If to the last, it takes away the possessory action, instead of giving it ; it is sufficient to have a good title, and to possess as owner under it, in order to be deprived of that right of action, even against a trespasser. If to the first, it leads to contradictions equally palpable, and to absurdities equally glaring. Admit that the possessor must have actually occupied and detained, without intermission, the estate, slave, or real right, during more than one year before the disturbance, and what follows ? A person owns a tract of wood land, upon which, from the nature of the property, the only act of possession he can in most instances do, is the payment of the taxes ; how is he to detain and occupy it ? Must he pitch a tent, and remain upon it a year and a day, without intermission, before his right of action accrues ? A slave absconds for a short time ; does his master lose thereby

his right of action against a person in whose possession he may subsequently be found ?

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A man has a right of passage upon another's estate, which he may not have occasion to use more than once in many years; is it necessary that he should have been actually using it for more than a year, before he can be heard ?

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We cannot admit as sound, a doctrine which leads to such consequences. The acts by which possession is evidenced, vary according to the nature and situation of the thing possessed, but possession itself is all of the same nature, and the general context of our laws does not justify the doctrinal division of it, into natural and civil. Article 3389, defines possession to be the detention or enjoyment of a thing which we hold or exercise *by ourselves or by another*. This embraces all sorts of possession, the absolute as well as the precarious; the just as well as the unjust; the civil as well as the natural. Article 2452 says, that tradition, or delivery, is the transferring of things sold into the power and *possession* of the buyer; and article 2455 provides, that the law considers the tradition and delivery of immoveables, as always accompanying the public act which transfers the property. Every obstacle which the seller afterwards interposes, to prevent the corporal possession of the buyer, is considered *as a trespass*.

No physical act, in taking possession under a sale by notarial act, is necessary. The intention of the purchaser, which the law presumes, coupled with the power which the act of sale gives, vests the possession in him. The right is taken for the fact, and he is seized of the thing corporally. Article 3405 goes on to provide, that when a person has once acquired corporal possession, the intention which he has of possessing, suffices to preserve it in him, although he may have ceased to have the thing in actual custody.

Article 3406 further says, that this intention of retaining possession is always supposed, where a contrary intention does not appear decidedly; so that although a person may have abandoned the cultivation of his estate, he shall not, therefore, be presumed to have abandoned the possession, but shall be presumed, on the contrary, to have the intention of retaining it, and shall retain it in fact.

No physical act in taking possession, is necessary under a sale by notarial act. The intention of the purchaser, which the law presumes, coupled with the power which the act of sale gives, vests the possession in him. The right is taken for the fact, and the buyer is seized of the thing corporally by the execution of the title.

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Article 3407, says, that a negative intention suffices. That is, it suffices that the positive intention which the party had, in acquiring the possession, shall not have been revoked by a contrary intention ; for so long as the revocation does not take place, the possessor is supposed always to retain his first intention, unless a third person has usurped or taken from him the possession, or he has failed to do any act showing his intention to possess for ten years.

Article 3468, says, that even after that time, vestiges of works, and ruins, are sufficient to preserve the possession, and to enable the possessor to prescribe under it. This article speaks of civil possession, but the designation is merely verbal.

There is but one kind of possession known to the law, which commences by the corporal apprehension of the thing, or the signing of the title which transfers it; and continues, whether or not the possessor actually occupies and detains the thing, until he is disturbed in fact or in law.

The foregoing provisions recognize but one kind of possession ; it commences by the corporal apprehension of the thing, or the signing of the title which transfers it, and continues, as it commenced, whether or not the possessor actually occupies and detains the thing, until he is disturbed, in fact or in law, or until ten years have elapsed without his doing any act of possession.

Article 3417, places among the rights common to all possessors, the right of action, which every person who has been in possession for a year has, against the person disturbing him, either to be maintained in his possession or to be restored to it, in case of eviction, either by force or otherwise ; and article 3419 expressly provides, that the only way in which that right can be lost is by leaving the trespasser in possession for one year.

Here there is a right of action given for all possessions alike, when they have lasted one year, and are not precarious, in direct opposition to the 49th article of the Code of Practice. One of these laws must yield, and we find no difficulty in saying which is to prevail. The court cannot be ignorant of the mode in which our codes were prepared and became laws. They were written by lawyers, who mixed with the positive legislation, ~~while some of the~~ definitions seldom accurate, and points of doctrine always unnecessary. The legislature modified and changed many of the provisions

relating to the positive legislation, but adopted the definitions and abstract doctrine, without material alteration ; from this circumstance, as well as from the inherent difficulty of the subject, the positive provisions of our code are often at variance with the theoretical part, which was intended to elucidate them ; and whenever that occurs, we deem it a sound rule of interpretation, to disregard the doctrine, and consider the definitions modified by the clear intent of the positive enactments. We are, therefore, of opinion, that the classification of possession into natural and civil, carries with it no legal effects. That all possessors, who have had possession quietly and without interruption, by virtue of one of the titles prescribed in the article 47, of the Code of Practice, for more than one year previous to their being disturbed, may maintain a possessory action, and that the possession of less than one year is sufficient, if they have been evicted by force or by fraud. In this instance, besides, the right to maintain a possessory action is given to all possessors, by the Louisiana Code. The Code of Practice was framed exclusively with a view to judicial proceedings, and its provisions on the subject of general laws do not necessarily repeal those of the Louisiana Code, that are contrary to or inconsistent with them.

The plaintiff's vendor had capacity to maintain the possessory action. The plaintiff became seized of the possession by the execution of the act of transfer, and for all useful purposes, he has the right to add the possession of his author to his own. It is true, that no act of possession is shown to have been done by him at the beginning, or since ; but as ten years have not elapsed since the actual possession of his author ceased, the possession has continued, under the article 3407, above referred to. We are of opinion that the possession of the plaintiff was sufficient to enable him to maintain his action.

With respect to the allegation that the defendants' ancestor acknowledged an owner, and that the defendants cannot, on that account, have acquired the possession, the evidence is contradictory, and it is not shown how far her admission could prejudice all the defendants. There is no doubt

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The Louisiana Code contains definitions and points of doctrine, as well as positive legislation ; and whenever there is any inconsistency in its provisions, the court will disregard the doctrine, and consider the definitions modified by the clear meaning of the positive enactments.

So, all possessors, who have had possession quietly and without interruption, by virtue of one of the titles, prescribed in the 47th article of the Code of Practice, for more than one year previous to being disturbed, can maintain a possessory action ; and the possession of less than one year is sufficient, in case of eviction by force or fraud.

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that if she took possession of the land, knowing and believing it to belong to Jumonville, she did not possess as owner, and those claiming under her could not maintain a possessory action. The defendants have not shown that they possessed by virtue of a title, or under any fixed boundaries; but as they appear to have been a long time upon the land, we are unwilling to pass upon their rights in the present situation of the case. Justice appears to us to require that it should be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, annulled and reversed, the verdict set aside, and the case remanded for a new trial, the defendants and appellees paying the costs of this appeal.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.

Under the Spanish laws, as they existed in this state in 1824, a legal mortgage attached in favor of minors, upon the property of the sureties of their curator, *ad bona*.

On the adoption of the Louisiana Code in 1825, all mortgages, whether conventional, legal or judicial, are required to be recorded; and in order to preserve their evidence, the inscription of mortgages must be renewed before the expiration of ten years; otherwise, their effect ceases after the expiration of that time, even against the contracting parties.

Mortgages to which husbands, tutors and curators are subjected by law, are the only ones not requiring registry by the Code; but under the Spanish law, there is no exception made with respect to the legal mortgage on the property of the surety of a curator.

So, where more than ten years elapsed, after the promulgation of the Louisiana Code, before the minors asserted their claim against the *surety* of their curator *ad bona*, and without the re-inscription of their legal mortgage within that time : *Held*, that the effect of the mortgage ceased, and it could no longer be enforced against the property on which it previously existed.

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This action commenced by the executory process, against mortgaged property in the possession of a third person.

The facts and pleadings of the case, are fully stated in the following opinion and judgment of the district judge :

"The heirs of Roche allege and prove, that Chretien gave his note, dated 29th March, 1825, to the widow Roche, payable one year after date, for one thousand six hundred dollars. The payment of this note was secured by a mortgage on a lot of ground, sixty by one hundred and twenty feet, at the corner of St. John and Common street ; this note was not paid, but on 29th March, 1826, Chretien paid the interest and gave another note, payable in one year, for one thousand six hundred dollars ; the original paraphed note was retained, and a receipt was given to surrender it if the second note should be paid. In 1827, the widow Roche obtained an order of seizure, but suspended it for a year, Chretien paying the interest.

"Chretien being desirous of paying his debt to the heirs of Roche, in May, 1835, made a power of attorney constituting Felix Grima his attorney in fact, to sell the lot at a price not less than two thousand dollars.

"Charles Tremoulet, the husband of one of the heirs of Roche, was to receive the proceeds of the sale, and if sold on a credit, was to approve the notes, endorsers, etc.

"On the 29th August, 1835, Felix Grima made an act, under private signature, in which, reciting the power of attorney from Chretien, he sold the lot to Groysilliere, through Denis, her agent, for the sum of two thousand five hundred dollars, viz : one thousand two hundred dollars when the act of sale (notarial) should be made, and one thousand three hundred dollars in notes, at six and twelve months. On 23d March, 1836, Tremoulet approved the sale and accepted the payment.

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"The money not being paid on 10th May, 1836, the heirs of Roche, alleging and proving these facts, obtained an order of seizure and sale against Groysilliere, as third possessor and owner, under the private act of sale.

"On the 18th June, 1836, Chretien filed an opposition and intervention in this suit :

"1st. Chretien claimed some credits from the heirs of Roche, for money paid on account of the mortgage : these are proved and allowed to him.

"2d. Chretien insists that he, and not Groysilliere, is the owner of the mortgaged lot, and alleges that the right to the lot is in contest between him and Groysilliere, in the suit No. 13,007, brought by Groysilliere against Grima, to compel a title ; and that the proceedings on the mortgage ought to be decided against him.

"3d. He concludes by praying for a judgment adapted to the nature of the case.

"On the 18th June, 1836, A. J. Walker and F. G. Walker, and on 2d March, 1837, L. C. Louques, daughter of Amelie Walker, intervened in the suit, and alleged that P. A. Cuvillier, deceased, was the curator *ad bona* of A. F. Walker, and tutor of F. G. Walker, and of Amelie Walker; that P. A. Cuvillier gave a bond for five thousand dollars for the faithful administration of their property, on 11th December, 1824 ; that Chretien was the security on the bond ; that the bond was recorded in the mortgage office of New-Orleans, on 18th December, 1824, and operates as a mortgage on the property of Chretien.

"That A. J. Walker obtained a judgment against Cuvillier, on his claim, on 30th May, 1834, for one thousand five hundred and forty-one dollars, with interest from 1st January, 1833, till paid.

"There has been no settlement with the two other minors; that Cuvillier is dead, and his estate insolvent.

"These claimants demand to be paid, by preference, out of the proceeds of this lot of ground.

"It appears that Chretien is the dative executor of Cuvillier, whose succession was opened in the parish of Iberville.

"On 30th June, 1836, Groysilliere filed his answer and opposition : EASTERN DIST.
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"1st. She pleads that the mortgage of Roche has ceased to have effect, not having been recorded within ten years.

"2d. She claims the credits set up by Chretien.

"3d. She asks leave to deposit two thousand five hundred dollars, the price to be distributed to the mortgagees, and the same is deposited.

"4th. She sets up and alleges a title to the lot, under the sale made by Grima, as attorney of Chretien, and refers to the suit in which that matter is in litigation.

"5th. She denies the right of mortgage of the Walkers, and insists that their claim cannot be liquidated in this court, but only with the succession of Cuvillier.

"6th. She sets out that since her purchase of the lot, she has fitted it up, erected a house and made great improvements.

"7th. She requires that the property be not sold until the title be settled.

"It appears to me that the claim of the heirs of Roche against the property, to the extent of the purchase money, cannot be contested by Groysilliere.

"The amount is liquidated at the sum of —, with interest thereon, at the rate of ten per cent. from the — until paid; for this sum the heirs of Roche are entitled to a judgment against Chretien.

"With regard to the claim of the Walkers, the counsel of Groysilliere resists their mortgage, alleging that there is no text of the Spanish law which gives a mortgage against the property of sureties, and that the Code of 1808, page 454, article 16, limits tacit or legal mortgages to those given by express law. It was a strong argument to urge, that the text of the Code referred to, gave only the tacit mortgages there referred to and immediately following. A different interpretation has been obtained. The text of the Partidas 6, title 16, appears to give a mortgage against the property of sureties of the bonds of tutors and curators, and the commen-

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tators have so considered for several hundred years; there cannot be better evidence of the law and its real construction.

"The claim of one of the Walkers is liquidated, and unless the heirs of Roche can point out other property, and furnish means for its discussion, it appears to me, they, Walkers, cannot be deprived of their preference of payment out of this property, if it be not sufficient to pay the whole claims.

"Groysilliere, by her purchase, admitting it to be established, could not take the property free of the mortgage of the Walkers. If she succeeds in obtaining a title to the property, she may have a claim over against Chretien; or, perhaps, she may even now have a right to call for the discussion of other property of Chretien. If Groysilliere has made improvements as she alleges, she may be entitled to claim *quantum res pretioror factor est*.

"It is difficult to say what must be the decree in this case. If the question of the title to the lot was settled between Groysilliere and Chretien, it would remove some, but not all of the difficulties. If the property was decreed to Groysilliere, at the price of two thousand five hundred dollars, it would still be subject to the mortgage of the Walkers, for which she would have recourse over against Chretien. If the property be decreed to Chretien, Groysilliere may have a claim for the value of her improvements. In any event, unless Groysilliere see fit to protect herself by payment of the mortgage to the Walkers and to the heirs of Roche, or pray discussion of other property of Chretien, and furnish means to carry it on, as to the claim of the Walkers, the property must be sold.

"A judgment should pass against Chretien, in favor of the heirs of Roche, for the amount of their claim; and against Chretien, in favor of the Walkers, for the amount of the tutors bond on which he is security, subject to such deduction as he may be entitled to, on a liquidation of the claims of the Walkers against the succession of Cuvillier."

Judgment was rendered in favor of the heirs of Roche against G. Chretien, for two thousand seven hundred and forty-six dollars, with ten per cent. interest on one thousand

six hundred dollars, from the 31st March, 1837, until paid ; and that the heirs of Walker recover from Chretien the sum of five thousand dollars as surety in Cuvellier's bond, as curator *ad bona* of the minors Walker, with legal mortgage, from the recording this bond in the parish of New-Orleans, the 24th December, 1824, etc.; that this mortgage is to have the preference of the special mortgage of the plaintiffs ; and that unless Madame Groysilliere pay this judgment, the lot of ground is to be seized and sold to satisfy it, after estimating her improvements, and reserving her rights against Chretien, etc., and that Chretien pay costs.

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The defendant, Madame Groysilliere, appealed. The appeal is taken against the plaintiffs and the heirs of Walker.

L. Peirce, for the plaintiffs. How can the defendant oppose to the heirs of Roche, that their mortgage was not recorded again within the ten years, when the sale was made to her by Chretien for the express purpose of paying this debt, and she undertook and assumed to do so.

2. The testimony of the notary shows, (who was also the agent of Chretien,) that the agent of Roche's heirs was present at the sale, and it was understood that the sum of two thousand five hundred dollars was to be paid to him out of the proceeds of the property, as such ; that the mortgage of Mrs. Roche was to be then raised. He agreed on receiving this sum to raise the mortgage, and which he was to receive from the defendant herself.

Roselius, for the defendant and appellant. The mortgage of the plaintiff is inoperative through lapse of time. An inscription of a mortgage must be renewed at the end of every ten years.

2. The heirs of Walker cannot assert a mortgage against any property owned by Chretien, on account of his suretyship in the curator's bond. There is no legal or tacit mortgage, (at least since the Civil Code of 1808,) existing on the property of sureties of tutors or curators of minors, on account of their administration.

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3. Even if such tacit or legal mortgage ever existed in this case, it has ceased and become extinct, in not being registered or *re-inscribed* within ten years immediately before the institution of this suit.

Hennen, for Walker's heirs, insisted that the judgment against Cuvillier, is legal evidence against his surety for the amount due the minors; especially when supported by the inventory of the estate and the other proceedings in the Court of Probates.

2. These minors have a tacit or legal mortgage on all the estate of their curator *ad bona*, and that of his surety, which commenced with the registry of the curator's bond in December, 1824. 7 *Febrero adicionado*, 24, No. 51. 5 *Tapia*, 266, No. 21. 6 *Partida*, 16 *título*, *law final*. *Sala Derecho Real*, lib. 1, *título* 7, No. 38, (edition 1803;) No. 39, (edition 1820.) *Asso & Manuel*, (Civil Laws of Spain,) page 33. *Code*, lib. 3, *título* 1, *law* 13, *section final*.

3. The renewal or re-inscription of mortgages, provided in article 3333 of the Louisiana Code, does not apply to the tacit or legal mortgages of minors against their tutors, curators, etc. This article expressly reserves the rights of minors, and forms an exception to the general rule. The Spanish law is full on this subject, and it was in force in 1824, except where it was expressly abrogated. This court has also repeatedly decided, that mortgages, privileges, &c., created by that law, though not found in the Civil Code of 1808, were valid, and in force here.

4. By the provisions of the old Code, it was not required to record mortgages against tutors and their sureties; and the reason is, it was a legal mortgage. *Civil Code*, page 464, *article* 54.

Pichot, for the minor Walker, represented by his mother, Amelie Walker. The judgment and proceedings of the Court of Probates in favor of a co-heir, is evidence of the sum allowed, and the amount of the claim of each; if it is for too much, the surety of the tutor should show it.

2. By the Spanish law, the property of the tutor and his

surety are tacitly mortgaged for the restitution of the minor's estate. The bond in this case was duly recorded. *Partida 6, title 16, law 21.* EASTERN DIST.
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3. Prescription cannot be invoked in this case, for not renewing or re-inscribing the legal mortgage of the minors Walker. The obligation of the surety is accessory to that of the tutor, or curator *ad bona*, and must last as long; and it cannot be pretended that a renewal of the inscription is necessary or required for the tutor's bond.

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L. Janin, for G. Chretien.

Rost, J., delivered the opinion of the court.

This is an hypothecary action instituted against a third possessor, on an act bearing date the 29th of March, 1825, and importing confession of judgment. No opposition is made to the amount allowed by the District Court, or to the right of the plaintiff to recover it in this action, but the heirs of Walker have intervened, praying to be paid by preference out of the proceeds of the sale, the amount of a legal mortgage, anterior in date to that of the plaintiffs, and existing in their favor upon the same property.

It appears, that in 1824, Gerard Chretien, the original debtor of the plaintiffs, and at that time the owner of the mortgaged premises, became security on the bond of the curator *ad bona* of the intervenors, and that in the same year the bond was recorded in the parish where the property is situated. That the curator died without having rendered his account, and left no property; the account of the claim of one of the intervenors was liquidated contradictorily with the curator, and the others aver, that they are ready to prove the amount due them.

The third possessor opposes this claim on various grounds, and alleges particularly, that the intervenors have no mortgage or privilege upon the property. Judgment was given in favor of the intervenors in the court below, and the third possessor appealed. We believe, that under the Spanish laws, which were still in force in 1824, a legal mortgage

Under the Spanish laws, as they existed in this state in 1824, a legal mortgage attached in favor of minors, upon the property of the sureties of their curator, *ad bona*.

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On the adoption of the Louisiana Code in 1825, all mortgages, whether conventional, legal, or judicial, are required to be recorded; and in order to preserve their evidence, the inscriptions of mortgages must be renewed before the expiration of ten years; otherwise, their effect ceases after the expiration of that time, even against the contracting parties.

Mortgages to which husbands, tutors and curators are subjected by law, are the only ones not requiring registry by the Code; but under the Spanish law, there is no exception made with respect to the legal mortgage on the property of the surety of a curator.

So, where more than ten years elapsed, after the promulgation of the Louisiana Code, before the minors asserted their claim against the surety of their curator *ad bona*, and without the re-inscription of

existed in favor of minors, upon the property of the sureties of curators *ad bona*, and that the bond in this instance having been duly recorded, operated as a legal mortgage upon the property specially mortgaged to the plaintiffs. But in 1825 the law was changed. The article 3317, of the Louisiana Code, makes it necessary that all mortgages, whether conventional, legal or judicial, should be recorded; and article 3333 provides, that the registry shall preserve the evidence of mortgages during ten years, but that their effect will cease, even against the contracting parties, if the inscriptions are not renewed, before the expiration of that time, in the manner in which they were first made. Mortgages to which husbands, tutors and curators are subjected by law are alone excepted from this rule. No exception is made with respect to the legal mortgage which existed on the property of the surety of a curator under the laws of Spain; and as more than ten years elapsed between the promulgation of the Louisiana Code and the intervention of the heirs of Walker in this suit, without the inscription of their mortgage being renewed, we conclude, that the effect of the mortgage has ceased, and that the plea of the third possessor is well founded in law.

Gerard Chretien has intervened and claimed title to the mortgaged premises, and the third possessor has joined issue. That issue cannot be tried in the present suit, nor can the judgment rendered therein affect in any manner the ultimate rights of the parties to the property. Whoever be the owner at this time, the plaintiffs are entitled to their remedy.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, annulled and reversed; and proceeding to give such judgment as ought to have been given in the court below, it is further ordered, adjudged and decreed, that the intervention of the heirs of Walker, and so much of that of Chretien, as relates to the question of title to the mortgaged premises, be dismissed at their cost in both courts; and that the said mortgaged premises be seized and sold to foreclose the mortgage, and pay

the plaintiff the sum of two thousand seven hundred and forty-six dollars, with ten per cent. interest on sixteen hundred dollars, from the 31st of March, 1837, until paid, and costs.

It is further ordered and adjudged, that the defendant pay the costs of this appeal, taken between her and the plaintiffs.

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their legal mortgage within that time : *Held*, that the effect of the mortgage ceased and it could no longer be enforced against the property on which it previously existed.

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ON AN APPLICATION FOR A RE-HEARING.

The article 3298, of the Louisiana Code, provides, that a mortgage exists without being recorded in favor of minors, interdicted or absent persons, on the property of their tutors, curators, and others, &c. ; but this mortgage is limited by the code, and does not extend to the property of the *sureties* of tutors, curators, *ad bona*, &c.

Hennen, on behalf of the heirs of Walker, who intervened in this case, insisted, that the court overlooked the provisions contained in the article 3298 of the Louisiana Code, in rendering judgment, and solicited a re-hearing.

That article provides, that "a mortgage exists without being recorded, in favor of minors, interdicted or absent persons, on the property of their tutors, curators and others, over whose property the law grants them a tacit mortgage, either general or special." It also gives to the wife a mortgage on her husband's property, without being recorded, for the restitution of her dotal rights.

The intervenors believe, that this article, under the liberal interpretation given to it by this court in the case of *Pain vs. Perrot*, 10 *Louisiana Reports*, 300, is sufficient to establish the justness of their mortgage claim on the property of the surety of their tutor or curator *ad bona*, and respectfully ask,

EASTERN DIST. that the judgment rendered in the case be corrected in
April, 1839. this respect, or that a re-hearing be granted.

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Rost, J., delivered the opinion of the court.

The court did not overlook the article 3298 of the Louisiana Code, and if it was not referred to in the decision, it is because it could in no manner affect it. That article provides, that a mortgage exists without being recorded, in favor of minors, interdicted and absent persons, on the property of their tutors, curators and *others*, over whose property the law grants them a tacit mortgage, either general or special; but articles 3283, 3284, and 3285 of the same code, explain and limit the meaning of the word *others*, and article 3280 precludes the idea that it was intended to embrace the legal mortgage existing in favor of minors, under the former laws of the country, upon the property of the sureties of curators *ad bona*. That article abrogates all the legal mortgages not expressly retained by the code, and that of minors upon the property of the sureties of curators among the rest. The law, therefore, as it now exists, far from granting them a mortgage, expressly refuses it; and the words, *others over whose property the law grants minors a mortgage*, cannot by any sound or reasonable rule of construction, be made to extend to the surety of a curator, upon a bond signed, either before or since the adoption of the code. We would not willingly increase the number of legal mortgages beyond the cases clearly designated by law, nor do we feel ourselves at liberty to perpetuate by a forced construction, the liability of sureties.

The re-hearing is refused.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINTE COUPEE, THE JUDGE OF THE SECOND PRESIDING.

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In a contract of sale of a plantation and slaves, in which the vendee paid four thousand five hundred dollars in cash, and it was stipulated that the vendor should make a title in fee simple the 1st of January following, when the balance of the price was to be paid and arranged, and on failure of the vendee to comply with his engagement, the sum already paid was to be forfeited to the vendor, to indemnify him for the chances of making a better sale: *Held*, that the contract was absolute, with the single exception, that it could not be enforced against the vendee if he failed to comply, but that the partial payment he had made, was to be considered the measure of damages for his non-performance.

When the resolatory condition in a contract, depends on the will of either party, the contract is not dissolved of right, by the happening of the condition, but its dissolution must be sued for, in all cases when it embraces immoveable property.

Good faith in a contract is always presumed, and the court will consider itself bound to believe the contracting parties understood each other, and that the vendor disclosed the truth in relation to the thing sold, when it is not otherwise shown.

This case was before the Supreme Court in February, 1838, and remanded for a new trial. See 11 *Louisiana Reports*, 551.

The facts of the case and the written contract between the parties, are fully stated and set forth in the former report, and need not be again stated.

The suit was instituted by Noe, to recover back the sum of four thousand five hundred dollars, which he had advanced to Taylor, in July, 1836, at the time of entering into the agreement to purchase from him the plantation and slaves mentioned therein. The written agreement contains the following clause, under which the contest arises in this case: Taylor stipulated "to make to said Noe a title in fee simple to said tract of land, on the 1st of January, and at the same time, such title to said slaves as is above expressed: *Provided*, said Noe shall faithfully comply with the agreements and

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covenants above and herein expressed. It is, also, hereby understood, agreed and declared, by and between said parties, that in the event of said James Noe not complying with his said engagements and covenants, on said 1st day of January next, *he forfeits* said sum of four thousand five hundred dollars, and that said Taylor may convert this sum to his own use, to indemnify himself for the chances of making a better sale of his property."

It seems that Noe, the vendee, failed and refused to execute the contract on the 1st of January, 1837, according to the stipulations contained in the written agreement of July preceding, alleging that the premises were encumbered with mortgages, so as to prevent the vendor from making a complete title.

On the return of the case, it was submitted to a jury, and several witnesses called to testify in relation to the understanding of the contracting parties at the time of the agreement. It appeared in evidence, that Taylor explained to Noe at the time, that there were some incumbrances on the land, and that the title to the slaves depended on the construction to be given to the will of the late Julien Poydras. It did not result from the testimony, that there was any deception or fraud on the part of the vendor. After a charge from the judge presiding, the jury returned a verdict for the defendant. From judgment rendered thereon, the plaintiff appealed.

A. N. and F. N. Ogden, for the plaintiff, contended that Noe was not bound to take the property subject to the mortgages existing on it, and give his notes for the balance; and the doctrine relied on in the case of *Borden vs. Borden*, 5 *Massachusetts Reports*, 67, that incumbrances existing on property do not authorize the purchaser to repudiate the title, is not law in this state.

2. From the amount and nature of the mortgages in this case, such a rule could not be applied without evident injustice to the purchaser, in forcing on him stipulations altogether different from the contract he had entered into. The con-

tract under consideration, we contend, does not amount to a sale, and does not entitle the party to a specific performance. The penalty stipulated by the purchaser, is in the nature of *earnest* money, which one of the parties has given and must forfeit on failure to comply ; but such a contract is not a sale. The existence of mortgages on the property, which would be good ground to suspend payment in case of an actual sale, would be sufficient ground before the sale to authorize the purchaser to withdraw from the contract. *Louisiana Code, article 2438. 1 Peters, 462, 4 and 5.*

3. If any or all of these positions should be deemed untenable, we contend that the purchaser could not, in this case, have been required to execute the contract by retaining the amount of mortgages, because he would have been thus compelled to pay a larger amount in cash, than he was bound by his contract to do, and the terms of the contract would have been altogether changed.

By an inspection of the certificate of mortgages, it will appear that the property was mortgaged in favor of the Union Bank, for a large amount of shares in the stock of that bank. That mortgage could not be removed for an almost indefinite period of time, unless other property, by the consent of the bank, was substituted in its place. The evidence, therefore, clearly shows that the rule contended for, could not be applied to this case, because the mortgages already due, exceeded the cash payment ; and because the mortgage to secure bank stock, would have existed after the whole price was paid.

4. We contend, lastly, that under the contract between these parties, it was necessary that Noe should have been put in *default*, and that he was not put in default by Taylor ; nor is there any thing to excuse the want of it. The evidence shows that on the day of sale Taylor remained at home until summoned by Noe's agent to repair to the parish judge's office ; going there at his request, and treating with him as agent, he cannot now question his power of attorney. The mortgages, to a large amount, appeared on the books of the recorder of mortgages. Taylor had prepared no state-

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EASTERN DIST. ment of the mortgages; he asked where the money and
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There can be no doubt that Taylor claims to retain the four thousand five hundred dollars, as damages for the passive breach of a contract, and the amount of these damages are fixed in the contract itself. The obligation of Noe was not absolute and independent, but the engagements of each party were necessarily dependent; to put Noe in default, it was necessary, 1st, That Taylor should have been able to comply with his engagements. 2d, That he should have put Noe in default, in one of the ways declared in article 1905 of the Louisiana Code.

Mitchell, for the defendant. The plaintiff did not attend on the 1st of January, 1837, to comply with his contract. The evidence shows that he resided in Mississippi, but he should have then attended and claimed a compliance by making the payments, or showing his readiness to pay. 2 *Marshall's Reports*, 168. 2 *Johnson*, 145. 5 *Massachusetts Reports*, 67.

2. In the absence of Noe, it was impossible for Taylor to tender a deed for the land and slaves, (even if it was necessary, which is denied;) and under these circumstances, it is the same as if the tender had been made. Taylor could have made a good and valid title, notwithstanding the mortgages, for they do not by any means amount to a defect of title. The law only requires that the title to the property should be a good one. The vendor is permitted to pay off the incumbrances or debts, with the money he receives, or allow the purchaser to retain the amount. See the case of *Borden vs. Borden*, 5 *Massachusetts Reports*, 67—75, *et seq.*

Rost, J., delivered the opinion of the court.

The facts of this case are stated at length in the report of the decision of this court, on a former appeal.

The plaintiff and defendant entered into a written agreement, which has all the essential requisites of a sale. The plaintiff binds himself therein to pay the defendant the sum

of one hundred and thirty thousand dollars, for a plantation and slaves, in the following manner : four thousand five hundred dollars cash in hand, paid, the receipt of which is acknowledged in the deed; twenty-five thousand dollars payable in gold or silver, on the 1st of January next following, and the balance in endorsed notes, to be delivered on the same day. On that day, also, possession is to be given, and a title *in fee simple* is to be made by the defendant; and the plaintiff further stipulates, that if he does not comply with his agreements and covenants, on the said 1st day of January, he forfeits the sum of four thousand five hundred dollars, and the defendant may convert it to his own use, to indemnify him for the chances of making a better sale of his property.

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The plaintiff did not comply with his agreements and covenants at the time appointed, and the defendant, considering the contract avoided as a sale, or a promise to sell, by the happening of the resolutory condition attached to it, retains the sum which the plaintiff agreed to forfeit, if he permitted that condition to happen.

The plaintiff sues to recover back that sum, on the ground that on the day appointed for the delivery of the plantation and slaves to him, the property was encumbered by several special mortgages, and particularly by one in favor of the Union Bank, to secure a large number of shares of the stock of that institution, which mortgage could not be raised, so as to enable the defendant to give him a title *in fee simple* on that day.

This is not an action for the rescission of the contract : the plaintiff takes for granted, that the contract no longer exists, and our first inquiry must be how it has been dissolved, for as long as it endures, it is the law of the parties.

It is clear to us, that the sum paid by the plaintiff cannot be considered as *earnest money*; it was not so characterized in the deed, and was simply paid as a part of the purchase money. We cannot now presume the existence of stipulations which the parties did not expressly make, and we are of opinion that the vendor could not evade the specific perform-

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When the resolatory condition in a contract, depends on the will of either party, the contract is not dissolved of right by the happening of the condition, but its dissolution must be sued for in all cases when it embraces immoveable property.

ance of his part of the contract, by returning to the purchaser double the sum he had received, or in any other manner. That contract was absolute, with the single exception, that if the plaintiff failed to execute it, it could not be enforced against him, and the partial payment which he had made, was to be the measure of damages for his non-performance. But even in that case, the contract was not dissolved of right, by the happening of the condition. When the resolatory condition is an event depending on the will of either party, the dissolution of the contract must be sued for in all cases, when it embraces immoveable property, and the party in default, may, according to circumstances, have a further time allowed for the performance of the condition. *Louisiana Code, article 2042.* Here the fact of the performance or non-performance of the plaintiff, depended exclusively upon his own will, and the contract exists until it is dissolved by a judgment.

Had an action for a rescission been instituted, it could not have been maintained. The facts proved at the last trial, by the witness Coyle, that the defendant fully explained to the plaintiff the will of Julien Poydras, and informed him that mortgages existed upon the property, stand uncontradicted and unopposed, and are conclusive against the plaintiff. He had been informed before the sale, of the danger of the eviction, and he could not suspend the payment of the price on that account. *Louisiana Code, 2535.* It is true that the witness does not remember that the defendant mentioned to the plaintiff the exact amount of the mortgages, nor does it appear in evidence that the mortgage given to secure the stock of the Union Bank was named particularly; but good faith is always presumed, and we are bound to believe that the defendant told the plaintiff the whole truth on the subject. If it was otherwise, it is the plaintiff's fault that it does not so appear before us. The witness was not cross-examined, in reference to these particular facts, and we must take his evidence without any restriction or limitation.

Good faith in a contract is always presumed; and the court will consider itself bound to believe the contracting parties understood each other, and that the vendor disclosed the truth in relation to the thing sold, when it is not otherwise shown.

It is, therefore, ordered, adjudged and decreed, that the

judgment of the District Court be affirmed, with all the costs in both courts, except that of the first appeal.

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Eustis, J., delivered a separate opinion.

My construction of the contract is this : I consider that Noe, if he should determine not to take the plantation of Taylor, was to give Taylor four thousand five hundred dollars, for having the refusal of it from the 21st of July to the 1st of January following, during which time Taylor could not sell, and Noe would have the chances of offering his bargain for sale. Taylor would not have bound himself without compensation, and it is expressly stated in the contract, that this sum of four thousand five hundred dollars was to indemnify him for the chances of making a better sale of his property. I, therefore, infer, that this was the consideration of the contract, so far as it relates to that sum. The property might rise, Taylor might have a better offer, and he would not deprive himself of the chances of a better sale, unless there was a certain sum paid as an indemnity for losing them.

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My opinion is, that Noe, in a breach of the contract on his part, was bound for nothing more than the four thousand five hundred dollars ; that this is the limit of his responsibility.

After this agreement, we hear nothing more of the plaintiff : his residence, it appears, was in Mississippi ; on the day fixed for the completion of the sale, Noe did not make his appearance. A gentleman of the bar presented himself on his behalf, but no authority is shown on his part to conclude the contract, or to bind his principal in any manner. I am satisfied from the testimony of Coyle, that Noe knew perfectly well that the estate was encumbered with mortgages, and that his disinclination to complete the purchase, originated from causes entirely independent of their existence. If Noe wanted to complete the purchase, or to comply with his contract, he ought to have been present himself, or by an attorney in fact, specially authorized, and complied, or offered to comply with the requisites of articles 1906 and 1907 of the Code. From his conduct, I infer his understanding of

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the contract, was, that he was not bound to comply with it, having left in the hands of Taylor the sum of four thousand five hundred dollars as an indemnity for losing the chances of a sale.

My opinion on this subject is confirmed by the well known fact, of the existence in this country in 1836, of that spirit of speculation which predominated in every contract made under its influence, changing not only its forms, but producing consequences until then unforeseen. Such being my convictions of the intention of the parties, and such the legal intendment of the contract, I think the judgment of the court below ought to be affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.

Compensation may be pleaded at every stage of the proceedings on the trial, if it be pleaded specially.

This is an action on an account for a balance of one thousand five hundred and fifty dollars, which the plaintiff alleges is due to him for services rendered the defendant, as manager of a saw mill.

The defendant pleaded a general denial. The case comes before this court on a bill of exceptions. On the trial, and before the testimony of the defendant was closed, the defendant, by his counsel, asked leave of the court to amend and file a plea of compensation of six hundred and thirty-three dollars, against the first item in the plaintiff's demand, being the note of the latter for that sum, but the court refused to grant the leave, and to permit the plea of compensation to be filed. The defendant took his bill of exceptions.

Judgment was rendered in favor of the plaintiff for the principal part of his demand, and the defendant appealed. EASTERN DIST.
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M^r Kinney and *M^r Millen*, for the plaintiff, prayed for the affirmance of the judgment.

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Roselius, for the defendant and appellant, insisted that compensation could be pleaded at any stage of the proceedings, previous to final judgment. *Code of Practice*, 367. 11 *Louisiana Reports*, 213. 2 *Martin, N. S.*, 135. 3 *Ibid.* 665. 5 *Ibid.* 135.

Eustis, J., delivered the opinion of the court.

On the trial of this cause, and before the testimony of the defendant was closed, the defendant by his counsel prayed the court for leave to file a plea of compensation for the amount of a promissory note subscribed by the plaintiff; the court refused to allow the plea to be filed, and the counsel for the defendant excepted to the opinion of the court.

We think the judge erred. The article 367 of the Code of Practice, is imperative. Compensation may be pleaded at every stage of the proceedings: *Provided*, it be pleaded specially.

The judgment of the District Court is, therefore, reversed, and the cause is remanded, with directions to the judge to allow the defendant to file his plea of compensation, as stated in the bill of exceptions, and that the appellee pay costs.

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LONG vs. FRENCH.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

An agreement to sell a lot of ground, in which it is designated, and the the price and terms of payment specified, is a sale, according to article

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2431 of the Louisiana Code, and the seller is bound to execute a title accordingly.

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Property claimed in a suit, in virtue of a sale, cannot be alienated by the adverse party, pending the action, so as to prejudice the plaintiff's right.

This is an action in which the plaintiff seeks to compel the defendant to make him a title to a certain lot of ground in the city of New-Orleans, in pursuance of a memorandum of sale.

The plaintiff alleges he has paid two hundred dollars in cash, and is ready to assume the other payments, according to agreement, but that the defendant has refused and failed to make him a legal title, to his damage four hundred dollars. He prays judgment, compelling the defendant to execute a title to the property, and for his damages.

The defendant pleaded a general denial; and avers, that he agreed with the plaintiff to cede to him his bargain or purchase of the property in question, and to put him in his place, for the sum of two thousand dollars, and to transfer to him the same right and title by which he had acquired it, without warranty except as to himself; that he has offered and tendered a transfer of said title to the plaintiff, who refused to accept it; whereupon, he offered to return him the two hundred dollars he had paid, which he also refused. He prays judgment in his favor, and for costs.

Upon these pleadings and issues, the cause was tried by the court.

The memorandum of sale, or agreement, upon which the plaintiff sued, is as follows:

"Benjamin F. French sold to Wm. Long one lot of ground in Duplantier-street, between Constance and Annunciation-streets; measuring, on Duplantier-street, twenty-four feet, by one hundred and twenty-seven feet in depth. Terms, two hundred dollars in cash; and to assume payment of notes now due on the property.

BENJAMIN F. FRENCH.
 WILLIAM LONG."

Some evidence was introduced, relative to the tender and demand of the plaintiff, to have the sale executed, and the refusal of the defendant ; upon which the parish judge sums up the case as follows :

EASTERN DIST.
April, 1839.

LONG
VS.
FRENCH.

"1. That a promise to sell amounts to a sale, when there exists a reciprocal consent of both parties, as to the thing and the price thereof. *Louisiana Code, 2437.*

2. That such promise and consent is proved by the memorandum signed by the two parties, and delivered to J. B. Marks, notary public.

3. That it is in evidence that the plaintiff paid to the defendant two hundred dollars in cash, as stipulated between the parties.

4. That it is also in evidence, that the plaintiff tendered to the defendant an amount more than sufficient to meet the payment of the two mortgage notes which became due in the beginning of January, 1837, and were among the notes the payment of which the plaintiff had assumed.

5. That according to articles 1757, 2449, 2450, 2451, 2477, 2479, of the Louisiana Code, warranty being implied in every sale, unless there be some contrary stipulation, such warranty must have been in the contemplation of the parties, when they signed the promise or consent delivered to the notary, and that therefore the defendant cannot legally refuse such warranty to the plaintiff.

6. That by the refusal and delay on the part of the defendant, to pass such an act of sale as the plaintiff had a right to demand, he has occasioned to said plaintiff damages to an amount of at least two hundred dollars."

Judgment was rendered, ordering the defendant to execute to the plaintiff a full and legal title for the lot of ground in question, on the latter complying with the terms and conditions of sale, and that the defendant pay two hundred dollars in damages, and the costs.

The defendant prayed for a new trial, on the following grounds :

1. That the judgment is contrary to law and evidence.

2. The judgment for the specific performance of the pro-

EASTERN DIST. mise to sell, cannot be executed, because the defendant has
April, 1839. sold the property in dispute to another person ; and if the
LONG plaintiff is entitled to any judgment, it can only be for
VS. damages.
FRENCH.

The new trial was refused, and the defendant appealed.

Strawbridge, for the plaintiff, asked for the affirmance of the judgment, with ten per cent. damages.

Roselius, for the defendant and appellant, contended that the evidence showed that the defendant offered to execute an authentic title to the property in question, but the plaintiff refused to accept it ; after this it was sold to another person. Ought the plaintiff to complain of this ?

2. The defendant was never under any obligation to sell the property to the plaintiff, for the writing relied on is not a promise to sell.

3. There is no proof in support of the damages awarded.

4. At all events the judgment of the court below must be reversed, because it is shown that it is impossible for the appellant to execute it, having transferred the title to the property to another person. Under such circumstances the plaintiff can only recover damages. *Louisiana Code, articles 1920, 1921.*

Eustis, J., delivered the opinion of the court.

The plaintiff alleges, that he contracted with the defendant for the purchase of a lot of ground, by an agreement annexed to the petition ; that he has paid to the defendant the sum of two hundred dollars, part of the price of the lot, and that the defendant refuses to comply with his contract, though requested by the plaintiff : he lays the damages at four hundred dollars. The object of this suit is to compel the defendant to execute a conveyance of the property by authentic act, and to recover damages.

By the tenor of the instrument referred to, it appears that "*Benj. F. French sold to Wm. Long*" the lot in question ; the terms were two hundred dollars cash, and the purchaser

to assume payment of notes due on the property. The agreement is signed by the parties. It is without date, but the time of its execution is established with sufficient certainty by evidence. The price to be paid, we consider to be sufficiently definite, and the instrument itself, as a sale, according to the article 2431 of the Louisiana Code.

The plaintiff appears to have performed all the requisites of the law in relation to his part of the contract, and we attach no weight to the reasons given by the defendant for his refusal to execute the conveyance.

The defendant, after the institution of this suit, made a sale of the property in litigation to another person, and has urged, in a motion for a new trial, this fact as a matter of defence against this action.

The assertion of this right on the part of the defendant, is in direct opposition to the article 2428 of our code. "The thing claimed as the property of the claimant, cannot be alienated pending the action, so as to prejudice his right." It is equally subversive of the first principles of justice, and only receives our notice for the purpose of expressing, as we feel ourselves bound to do, our reprobation of it. This act on the part of the defendant, shows a settled determination on his part to sport with his contract, and to defeat, at all hazards, every effort which his adversary may make to obtain his just rights from the tribunals of his country. It is to be regretted that parties will not understand, that in conduct like this, they can receive neither aid nor countenance from a court of justice. We give no opinion on the question of the admissibility of the evidence concerning special damage, under the general allegation in the plaintiff's petition. We think the sum of two hundred dollars no more than sufficient to compensate the party for damages incident to this breach of contract, particularly as the defendant, by his act of sale of the 2d of November, 1836, has shown to us that the lot could have been sold at a large profit

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LONG
VS.

FRENCH.

An agreement to sell a lot of ground in which it is designated and the price and terms of payment specified, is a sale according to article 2431 of the Louisiana Code, and the seller is bound to execute a title accordingly.

Property claimed in a suit in virtue of a sale, cannot be alienated by the adverse party pending the action, so as to prejudice the plaintiff's right.

The judgment of the parish court is affirmed, with costs in both courts.

EASTERN DIST.

April, 1839.

YOUNG vs. WALKER ET AL.

YOUNG
vs.
WALKER ET AL.APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.

Where the case presents no question but one of ownership, which turns upon mere matters of fact, and the evidence is multifarious and contradictory, the judgment of the inferior court will be affirmed.

This is an action to recover a raft of timber, which the plaintiff alleges the defendant took forcible possession of in the state of Arkansas, and brought to the city of Lafayette for sale. He alleges that he is the true owner, and prays judgment that it be decreed to belong to him, and in the mean time that it be sequestered.

The defendant, Isaiah Walker, answered separately; pleaded a general denial, and averred that he was the true owner, and prays to be restored to, and quieted in his possession of said raft.

The other defendants disclaimed ownership, and were made witnesses for the defendant on the trial.

The suit was first instituted in the Parish Court for the parish of Jefferson.

The testimony is indefinite and contradictory. It appeared, that the plaintiff got out and procured the timber for the raft, and that his tools, clothing, and bedding were on the raft when the defendant took possession of it.

It further appeared, that Young had sold or agreed to sell this timber to one Hodge, who died about the same time, and it was taken into possession by one W. Walker, as administrator of Hodge, who sold it as such, and it was bought by his brother, the defendant.

George Walker, who testifies to the sale to Hodge, also swears that Hodge declared he had returned the timber to Young, when one King wished to buy it of him.

Young endeavored to assert his right in Arkansas, by arresting and charging the defendant with a criminal offence, for taking the timber, but was unable, as is said, from local difficulties, to put the law in force.

Upon hearing the whole evidence, and examining many of the witnesses in court, the parish judge was of opinion the plaintiff was entitled to recover. From judgment rendered against him the defendant appealed to the District Court.

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VS.
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On reviewing the evidence of the case, the district judge, after balancing much between the parties, in consequence of the conflicting and indefinite character of the testimony, finally concluded that the plaintiff ought to recover; and from judgment rendered in the plaintiff's favor, the defendant appealed.

M^r Kinney, for the plaintiff.

W. R. B. Wills, for the defendant and appellant, insisted that the defendant came to this state in the open possession of the raft, and publicly claimed it as his own. It is personal property, and his possession is evidence of title. None but a good and better title could take it from him. The plaintiff has shown none. His witnesses are interested, without credit, and their testimony contradictory.

Martin, J., delivered the opinion of the court.

In this case, which originated in the Parish Court of Jefferson, the plaintiff seeks to recover a raft of timber, alleged to have been forcibly taken from him in the state of Arkansas, by the defendants, who brought it down to the town of Lafayette.

The defendant, Walker, filed a separate answer, denying all the facts alleged, and averring that he was the legal owner of the raft; he claimed damages in reconvention. The other defendants disclaimed any right to the raft. There was judgment for the plaintiff, and the defendant, Walker, appealed to the court of the first district, after an unsuccessful attempt to obtain a new trial.

The District Court affirmed the judgment of the Parish Court, and the defendant took the second appeal. The case presents no question except that which relates to the ownership of the raft, and turns upon mere matters of fact. The

Where the case presents no question but one of ownership, which turns upon mere matters

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AMORY ET AL.

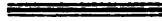
VS.

BLACK.

of fact, and the
evidence is mul-
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the judgment of
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court will be af-
firmed.

appellant had the benefit of the testimony of his co-defendants, notwithstanding the opposition and bill of exceptions which the plaintiff took to the admission of that testimony. The evidence is multifarious, and somewhat contradictory; and we have risen from a close examination of it with the impression, that the district judge correctly concluded, that the judgment of the Parish Court should be sustained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.



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AMORY ET AL. VS. BLACK.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The acceptance of a contract need not be expressed in it, or signed by the party. It results from his acts in availing himself of its stipulations. Although parole evidence is not admissible to prove a written contract, yet it will be received as proof of acts done by the parties in execution of it.

A judgment which assigns no reasons must be reversed; but the Supreme Court, when the record enables it, will render such judgment as ought to have been given in the first instance.

The amicable demand is founded upon the presumption, that if made before suit, the defendant would pay and save costs; and where no amicable demand has been first made, if upon service of citation, the defendant complies with the prayer of the petition, the plaintiff must pay the costs. But it is otherwise if he comes into court to defend the action and judgment goes against him.

This is an action to recover from the defendant one thousand three hundred and eighty-two dollars and fifty cents, being the one-half of the net profits of a cargo of flour, sold

on the joint account of plaintiffs and defendant, in pursuance of a written contract between them.

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The contract is annexed, as follows : "Whereas F. and G. W. Amory, have made a sale and delivered to me seven hundred barrels of flour at four dollars and fifty cents, payable on condition that the said flour should be sold by me on joint account with them : that is to say, they are entitled to one-half of the net profits that may be realized from the sale of this lot of flour, now shipped on board flat boats by Wm. Onyet, at a rate of one dollar per barrel, more or less, etc. I hereby promise to render an account of sales to M. Turner of New-Orleans, and pay over to him one-half of all the profits that may accrue on sales of said flour, over and above the freight and other necessary charges, unless otherwise advised and agreed on with Mr. Turner, for me to pay over the same at Evansville, to F. and G. W. Amory & Co., in case I return there previous to the close of navigation this fall. P. McKeever is to go on the boat as supercargo on the part of Amory & Co., and is authorized by them to make a sale of the one hundred barrels of flour, shipped by them on the Convoy, at eight dollars, as expressed in the bill of lading, releasing William Black from his responsibility, as consignee of sales by the way, of said one hundred barrels ; and the said Amory & Co., are to bear half of the losses on said flour shipped on joint account as aforesaid, should any losses be sustained.

"WM. BLACK.

"Witness, C. MORY."

The defendant, after an unsuccessful effort to set aside the order of bail, in this case, filed his answer, pleaded a general denial and want of amicable demand.

On the trial, the written contract and the testimony of McKeever, the supercargo of the flour boats, and Onyet, who commanded them, were produced and offered by the plaintiffs in proof of their demand. This evidence fully supported it, but its introduction was opposed :

1. The written contract was objected to, because it had not been signed by the plaintiffs, or accepted by them.

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VS.
BLACK.

2. The testimony of M'Keever and Onyet, was objected to as inadmissible, because the plaintiffs had sued on a written contract, and could not explain, contradict or enlarge it by parole testimony.

The evidence was all admitted, and the defendant's counsel took his bill of exceptions.

The court pronounced the following judgment :

"This cause came on for trial, etc., when, after hearing testimony and arguments of counsel, the court order and adjudge, that judgment be entered in favor of the plaintiffs against the defendant, Wm. Black, for the sum of one thousand three hundred and twenty dollars and costs of suit."

The defendant appealed.

Lockett and *Micou*, for the plaintiffs, showed, that by the provisions of the contract on which suit is brought, the plaintiffs sold to the defendant seven hundred barrels of flour at four dollars and fifty cents per barrel, on condition that the flour should be sold on joint account, and each to receive one half of the net profits. These are shown to be two thousand six hundred and sixty dollars, and according to contract, the plaintiffs are entitled to the sum of one thousand three hundred and thirty dollars, for which they pray judgment.

M'Millen and *Grivot*, for the appellant, insisted, 1. That there was no amicable demand, and judgment must be reversed. 1 *Louisiana Reports*, 419. 4 *Ibid.* 104.

2. The judgment is null and void for want of reference to the law, and the reasons on which it was rendered.

3. The contract was improperly received, because it was incomplete; never having been signed or accepted by the plaintiffs, and bears date long after the transaction in flour between the parties, took place. It contains only a proposition to ship and sell the flour on joint account, and the flour was delivered and paid for by defendant, nearly a month before this proposition was made. No suit can be maintained on such a writing. See 1 *Martin*, N. S., 420. 4 *Louisiana Reports*, 77.

Rost, J., delivered the opinion of the court.

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This action is instituted upon a contract, by which the plaintiffs sold to the defendant seven hundred barrels of flour, at four dollars and fifty cents per barrel, on condition that the flour should be taken to New-Orleans by the defendant, and sold by him on joint account; the plaintiffs to receive one half of the profits and to bear one half of the losses. The signature of the defendant to the agreement is admitted, and it is proved that the flour was delivered to him; that he took it to New-Orleans, and that it was sold at a profit of two thousand six hundred and forty dollars, one half of which the plaintiffs claim.

The defendant pleaded the general issue, and want of amicable demand. Judgment was given against him in the court below, and he appealed.

The appellant has filed the following points :

1st. That there was no contract, because the document offered as evidence of it was not signed by the plaintiffs, and because the flour had been delivered and paid for, several weeks before its date.

2d. That the evidence of M'Keever and Wm. Onyet had been improperly admitted, inasmuch as the plaintiffs sued upon a written contract.

3d. That no amicable demand had been made.

4th. That the judgment of the District Court assigned no reasons.

The acceptance of the plaintiffs need not be expressed; it results clearly from the fact of their sending Patrick M'Keever down with the boats, as supercargo, agreeably to the stipulation of the contract. The flour was already delivered, and they thus performed the only act required from them. The fact that the flour had been delivered, and the money paid by the defendant, before the act upon which the plaintiffs sue was signed, cannot affect its validity; it appears by that instrument itself, that the contract which it evidences had been made at the time of the sale of the flour, and the fact that it was not reduced to writing, for some days after, is immaterial.

The acceptance of a contract need not be expressed in it, or signed by the party. It results from his acts in availing himself of its stipulations.

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BAPTISTE F. W. C.

vs.
SOULIE F. W. C.

Although parole evidence is not admissible to prove a written contract, yet it will be received as proof of acts done by the parties in execution of it.

The amicable demand is founded upon the presumption, that if made before suit, the defendant would pay and save costs; and where no amicable demand has been first made, if upon service of citation, the defendant complies with the prayer of the petition, the plaintiff must pay the costs. But it is otherwise if he comes into court to defend the action and judgment goes against him.

2d. The testimony of M'Keever, and Wm. Onyet, was properly admitted. It does not prove the contract, but only the acts done by the parties in execution of it.

3d. The judgment assigns no reasons, and must, therefore, be reversed.

4th. The amicable demand was not proved, and as the want of it is specially pleaded, we are compelled to notice it. The law requiring an amicable demand before the institution of a suit, can have no other foundation than the presumption that upon that demand the defendant will satisfy the plaintiff's claim, and thereby save costs; and where no amicable demand has been made, if upon service of the citation the defendant complies with the prayer of the petition, the costs incurred must be borne by the plaintiff; but if instead of this, he comes into court to defend the action and judgment is subsequently given against him, the legal presumption which operated in his favor has ceased to exist, and we see no reason why he should recover any costs made after his first appearance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and it is further ordered and adjudged, that the plaintiff recover from the defendant the sum of thirteen hundred and twenty dollars, with the costs made in the District Court, after the first appearance of the defendant, inclusively; the remaining costs in the District Court, and the costs of this appeal, to be paid by the plaintiff and appellee.

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BAPTISTE, F. W. C., vs. SOULIE, F. W. C.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

The jury are the best judges of the facts submitted to them; and unless on

examination of the evidence shows error, to induce a reversal, the judgment will not be disturbed. EASTERN DIST
April, 1839.

The record and judgment of a suit between other persons and the plaintiff, are not admissible in evidence, except to show that such judgment was rendered; but the parole evidence, on which it was obtained, cannot, because it forms part of the record, be received as proof in another suit. BAPTISTE F. W. C.
vs.
BOULIN F. W. C.

This is a redhibitory action, in which the plaintiff seeks to rescind the sale of two slaves made to her by the defendant, and to have her note for the price, amounting to nine hundred dollars returned, and for damages.

She alleges, the slaves were afflicted with a pulmonary disease, at the time of sale, which was known to the seller, but which she fraudulently concealed, and of which the slaves died shortly after their delivery, following the sale.

The plaintiff further alleged, she had been sued on the note in question, by Miramond, O'Duhigg & Co., to whom the defendant had transferred it. She prays for judgment, restoring to her the note she gave as the price of said slaves, together with all the interest and cost recovered from her, in the suit of Miramond, O'Duhigg & Co., and for two hundred dollars in damages.

The defendant pleaded a general denial to the material allegations in the petition.

On the trial, many witnesses were examined; and the record of the suit of Miramond, O'Duhigg & Co., against the plaintiff in this case, on her note given for the price of the slaves in question, was by her counsel offered in evidence, to which the defendant's counsel made opposition, on the ground that the defendant was no party to that suit. The opposition was sustained, and the plaintiff took her bill of exceptions.

The cause was submitted to a jury, on the evidence adduced by the parties, who returned a verdict for the defendant, and the plaintiff appealed from the judgment rendered thereon.

D. & J. Seghers, for the plaintiff.

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April, 1839.

BAPTISTE F.W.G.
VS.
SOULIE F.W.G.

Pichot, contra.

Rost, J., delivered the opinion of the court.

This is a redhibitory action, for the rescission of a sale of a mulatto woman and her child, on the ground that before and at the time of the sale, the said slaves were, to the knowledge of the defendant, affected with a pulmonary disease, of which they both died.

The defendant admits the sale, pleads the general issue, and the prescription of one year.

The jury are the best judges of the facts submitted to them; and unless an examination of the evidence shows error to induce a reversal, the judgment will not be disturbed.

The record and judgment of a suit between other persons and the plaintiff, are not admissible in evidence except to show that such judgment was rendered; but the parole evidence on which it was obtained, cannot, because it forms part of the record, be received as proof in another suit.

This cause was tried by a jury, who gave their verdict in favor of the defendant, and the motion for a new trial, made by the plaintiff, having been overruled, she appealed.

The questions involved in the case are questions of fact, which the jury had better opportunities to decide than we can possess; and after a careful examination of the evidence submitted to them, we see nothing which could induce us to reverse the judgment.

The plaintiff took a bill of exceptions to the refusal of the court to admit in evidence the record of a suit, by Miramond, O'Duhigg & Co., against Marcelette Baptiste and Widow Ferdinand.

The proceedings had no reference to this suit, and the only object in attempting to introduce them, was to introduce with them the testimony of Doctor Fortin, taken in that court, and on file in the record. The attempt was clearly illegal. A record may be introduced in evidence, to show that a judgment was rendered, but the parole evidence upon which it was obtained cannot, because it forms part of the record, be received as proof in another suit. If in any particular case such evidence is admissible, it is so *per se* on other grounds, and independently of the record to which it is attached. We think the judge did not err.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

LONEY vs. HIGH.

EASTERN DIST.

*April, 1839.*APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.LONEY
vs.
HIGH.

The privilege given to persons desirous of building houses contiguous to those of their neighbors, and for that purpose to demolish and rebuild the walls of the latter, is one which cannot be exercised with too much care and attention. If any neglect ensues, the party is liable in damages.

In cases where it is difficult to assess the damages sustained by the party complaining, those given by the jury, even *when high*, will be sanctioned, rather than expose the parties to the expense and vexation of further litigation.

This is an action for damages alleged to be occasioned by the defendant in demolishing the walls and chimneys of the plaintiff's house, and building a privy over the line between them.

The plaintiff alleges that the defendant, in the months of April and May, 1835, erected a brick building, two stories high, with kitchen, privies, etc., adjoining him on Rampart street, New-Orleans; that he used his wall for the first story and ordered all above to be demolished, together with the chimneys, without his consent, and left his house exposed to the inclemency of the weather; that when the wall was raised to the height of petitioner's house, the defendant neglected to make the necessary repairs to his roof, which had been much injured by demolishing the wall, or to rebuild his chimneys. This, together with other injuries, have caused him damage to the amount of one thousand dollars, besides forty dollars he had actually to pay in repairs, to enable him and his family to live in his house. He prays judgment for his damages and money expended for repairs, and that the defendant be condemned to demolish and remove his privies, which he caused, illegally, to be built over his line, etc.

The defendant admitted the erection of his building contiguous to that of the plaintiff, and in doing so, found it necessary to uncover and remove a portion of the roof of his house, but avers he was ready and offered to repair it imme-

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April, 1839.

LONEY
vs.
RICE.

diately, for which he had his workmen and materials ready, and was prevented by the plaintiff from doing so; he avers that his privies are built and constructed according to law, and, also, that he is in no manner liable to the plaintiff in damages; but on the contrary, he avers that Loney has thrown various impediments in his way in erecting his building, and caused him damage to the amount of five hundred dollars, for which he prays judgment in reconvention.

Upon these pleadings and issues, the cause was tried before the court and a jury.

Several witnesses were called on both sides, and the testimony was voluminous and contradictory in many particulars; after hearing the parties and arguments of counsel, and receiving a charge from the judge presiding, the jury came to the conclusion that the plaintiff had suffered damage in consequence of the neglect and some illegal acts of the defendant. They returned the following sealed verdict:

"The jury find for the plaintiff, with damages amounting to six hundred and sixty-seven dollars; the flues of the privies to be demolished from the partition wall, and the privies placed according to law."

The defendant prayed for a new trial, on the following grounds:

1. The verdict and judgment are contrary to law and evidence.

2. That no specific damages were proved, and the jury should not have awarded any.

3. If any damages had been proved, the judgment grants more than had been established.

4. The evidence shows that if the plaintiff suffered damage, it was in consequence of his refusal to permit the defendant to repair his roof.

5. There is no evidence that the privies are not built according to law.

The court refused, after hearing the parties, to grant a new trial; and from judgment confirming the verdict, the defendant appealed.

Roselius, for the plaintiff, urged the affirmance of the judgment, as it was supported by the evidence of the case. There were no points or principles of law involved, and the only questions were of fact alone, which the jury properly decided.

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April, 1839.

LONEY
VS.
HIGH.

Schmidt, for the defendant.

Martin, J., delivered the opinion of the court.

The plaintiff complains, that the defendant, owner of a lot contiguous to his, demolished part of the wall of the plaintiff's house, in order to rebuild more strongly, and raise it to a greater height. The house which the defendant intended to build, adjoining to the plaintiff's, being much larger and higher, and that the work was done in a manner so careless and improvident, that the inside of the plaintiff's house was for several days exposed to the weather, which was so inclement that it was filled with water, a considerable part of his furniture injured, and his family much distressed. The general issue was pleaded, and he had a verdict and judgment for six hundred and sixty-seven dollars, and the defendant appealed, after an unsuccessful attempt to obtain a new trial.

There was a bill of exceptions to the reading of a deposition objected to on the ground of the insufficiency of the notice given to the defendant. We have not acted on it, because it has appeared to us that the case could well be considered without taking into view that deposition.

The privilege which is given to persons desirous of building houses contiguous to those of their neighbors, and for that purpose to demolish and rebuild the walls of the latter, is one which cannot be exercised with too much care and attention, and which, even when so exercised, is productive of great inconvenience and trouble to the owners of houses whose walls are thus demolished. The testimony in the present case is somewhat contradictory; but it appears beyond doubt, that the defendant neglected the ordinary precaution to stop, with planks, the openings left by the demolition of the wall, so as to protect the inside of the house

The privilege given to persons desirous of building houses contiguous to those of their neighbors, and for that purpose to demolish and rebuild the walls of the latter, is one which cannot be exercised with too much care and attention. If any neglect ensue, the party is liable in damages.

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BANKS
VS.
BRANDER ET AL.

In cases where it is difficult to assess the damages sustained by the party complaining, those given by the jury, even when *high*, will be sanctioned, rather than expose the parties to the expense and vexation of further litigation.

from the weather, while the wall was demolished, and until it was completely rebuilt. It appears that the inside of the plaintiff's house was, for a considerable time exposed; and for some time to a storm and rain; so that the family was compelled to seek refuge in the kitchen, at a time when the plaintiff's wife was sick. That the furniture was much injured by the rain. In a case like the present, it is extremely difficult to assess the sufferer's damage, with any degree of correctness or precision; and those given by the jury in the present case, have appeared to us very high; but we have felt great reluctance to expose the parties to the trouble and expense of farther litigation, by remanding the case for a new trial. In acting on it, we have found ourselves without any certain criterion; therefore, have been compelled to coincide with the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

BANKS VS. BRANDER ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.

The plaintiff may strike out his own endorsement on the bill, at the trial.

A defendant who insists on his plea of discussion, must specially point out property and tender the costs. It is not sufficient to aver that the principal debtor has property in a particular parish, and that the party is ready to advance the costs of discussion.

The acceptor of a bill is bound absolutely, and the holder is not required to sue either the drawer or endorsers.

This is an action against the acceptors of a bill of exchange.

The defendants admit their acceptance, but aver that the bill was accepted for the accommodation of the drawer, L. Tanner; the defendants not having at the time, nor since, funds of the drawer in their hands; that the plaintiff well knew their acceptance was an accommodation, and that being sureties of the drawer, the holder is bound to discuss the property of the drawer before proceeding against them. That said Tanner is perfectly solvent, and has unincumbered property in the parish of Terrebonne, more than sufficient to satisfy the plaintiff's demand; and that they are, and ever have been, ready to advance the costs. They, therefore, plead the exception of benefit of discussion, and pray that the petition be dismissed.

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The defendants further aver, that they are not responsible, because the plaintiff has granted indulgence and an extension of time to the drawer; and further, that they agreed with him that the bill should be paid in good merchantable sugar, and that he has since refused to receive it. That they are, and always have been, ready to discharge said obligation, as agreed upon with the plaintiff. They pray that the suit be dismissed.

On the trial, the plaintiff established his demand. The defendants failed to prove the agreement to pay in sugar, or any compliance with such agreement.

The defendants' counsel took bills of exception to the plaintiff's striking out his own endorsement on the bill, and to proceeding in the trial, because the exception, filed in the case, should have been first disposed of on some Friday, according to the rules of court.

There was final judgment for the plaintiff, and the defendants appealed.

F. B. Conrad, for the plaintiff.

T. Slidell, *contra*,

Martin, J., delivered the opinion of the court.

The defendants, sued as acceptors of a bill of exchange,

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pleaded the general issue, and that they accepted the bill for the accommodation of the drawer, having no funds of his in their hands, to the knowledge of the plaintiffs. That thus they are sureties of the drawer, who is first to be sued, and has unincumbered property in the parish of Terrebonne. They averred themselves ready to advance the costs of discussion: further, that the plaintiff indulged the drawer with a delay of payment, and agreed with the defendants to receive sugar in payment of the draft; that they have tendered him the sugar, and he has refused to receive it. There was judgment for the plaintiff, and the defendants appealed.

Our attention is first drawn to two bills of exception. The first is to leave being granted to plaintiff to strike out his own endorsement on the back of the bill.

It does not appear to us the court erred; the endorsement being in blank.

The plaintiff may strike out his endorsement on the bill at the trial.

A defendant who insists on his plea of discussion, must specifically point out property and tender the costs. It is not sufficient to aver that the principal debtor has property in a particular parish, and that the party is ready to advance the costs of discussion.

The acceptor of a bill is bound absolutely; and the holder is not required to sue either the drawer or endorsers.

The second bill is to the trial of the cause before the exception of discussion was acted upon, on a Friday, according to the rules of the court. The District Court observed, that if the defendants were entitled to discussion, it is not an exception, but would operate a modification of the judgment. The exception ought to have been disregarded, because the defendant did not specifically point out any property of the drawer, but contented himself with naming the parish in which he alleged such property was, and with averring his readiness to advance the costs of discussion, without making the actual tender. *Louisiana Code, article 3016.*

On the merits, the signature of the defendants, as acceptors of the bill, was admitted. They failed to prove the alleged promise of the plaintiff to receive the sugar in payment. The acceptor of a bill of exchange is a principal; he owes the money absolutely to the holder of the bill, who is not bound to sue either the drawer or any endorser, on the failure of the acceptor to comply with his engagement. He is not the surety of the drawer, the obligation of whom depends on the failure of the acceptor to comply with his own.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

BANK OF ORLEANS *vs.* RICE.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

B'K OF ORLEANS
vs.
RICE.

An exception which on the face of it is frivolous, and puts nothing at issue, need not be set for trial, but may be dismissed on motion.

This is an action on a promissory note under protest. The defendant excepted to the petition, on the ground that it did not set forth the place of residence of the plaintiff.

The counsel for the plaintiff, on motion, and giving the court to understand that the exception was frivolous on its face, had it dismissed. Judgment by default was confirmed, and a new trial prayed for, on the ground that the exception was dismissed without being called up for trial. A new trial was refused, and the defendant appealed.

L. Peirce, for the plaintiff.

Eggleston, contra.

Rost, J., delivered the opinion of the court.

The plaintiff seeks to recover from the defendant the amount of a promissory note. The defendant filed as an exception that the residence of the plaintiff was not set forth in his petition, and prayed to be dismissed with costs, on that account. On motion of plaintiff's counsel, that exception was dismissed by the court, on the ground that it was frivolous on the face of it. Judgment by default was entered against the defendant, and after the usual delays, and proof of the plaintiff's claim, it was made final. The defendant appealed.

The judge was undoubtedly right in dismissing, as he did, an exception which on the face of it was frivolous; it put nothing at issue, and need not have been set for trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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FLORANCE
vs.
ALSTON.

FLORANCE vs. ALSTON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

When there is no amicable demand proved, and the want of it is specially pleaded, the judgment will not be affirmed with damages, although the appeal is frivolous.

So, where the defendant appeared and pleaded the want of an amicable demand, but had no valid defence, he was required to pay all the costs in the inferior court, after his first appearance there.

This is an action on a promissory note under protest. The defendant appeared, admitted his signature, and averred, that there was no legal or valid consideration given for his note, but that the plaintiff received it on an usurious consideration; and that there has been no amicable demand. He prays that the suit be dismissed.

On the trial, there was no proof of an amicable demand, except the protest of the notary. The defendant offered no evidence to support his defence.

There was judgment for the plaintiff, for the amount of the note sued on, together with interest and costs. The defendant appealed.

Lockett, for the plaintiff.

M. Millen, contra.

Rost, J., delivered the opinion of the court.

This action is upon a promissory note. Judgment was given in favor of the plaintiff in the court below, and we would affirm it with damages, were it not that no amicable demand is proved to have been made before the institution of the suit, and that the want of it is specially pleaded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, annulled and reversed, and that the plaintiff recover from the defendant the sum of one thousand and twelve dollars, with legal

interest on the sum of one thousand and nine dollars, from the 2d of October, 1837, till paid, and the costs of the District Court, made after the first appearance of the defendant, inclusively, the remaining costs in the District Court, and the costs of this appeal, to be paid by the plaintiff and appellee.

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CLAIBORNE ET AL

vs.

THEIR CREDITORS

CLAIBORNE ET AL. vs. THEIR CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The owners of steam-boats carrying freight and passengers, are commercial partners; and in liquidating the partnership affairs, when some of the partners are insolvent, the other partner cannot withdraw his proportion of the proceeds of the steam-boat, until the partnership debts are first paid.

The proceeds of insurance on a lost steam-boat, owned by several partners are partnership funds, and must be first applied to the payment of partnership debts, in preference to those of the individual owners or partners.

On the 9th February, 1838, Joseph Claiborne and Henry S. Mather, filed their petition and schedule, and prayed for the benefit of the insolvent laws of this state. The petitioners allege that they were three-fourths owners of the steam-boat Marmora, together with one J. Leflicher, who owned the other fourth. That they had embarked all their means in said boat, which was insured for the sum of forty thousand dollars, and shortly afterwards burnt and totally lost in the port of New-Orleans.

They state their interest in the insurance money arising from this loss, with about one thousand dollars in debts and dues owing to the boat, to be all the property or effects that

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they own, and that their losses by misfortune in business, exceeds that sum. They pray that a meeting of their creditors be called, and that the surrender of their property, above named, be accepted by their creditors, and that they be discharged.

The creditors had a meeting and appointed a syndic to take charge of and distribute the effects and funds of the insolvents. Leflicher and his assignees of a part of his interest in the steam-boat, sued the insurance office to recover their share of the proceeds of insurance. This suit was united with the insolvent proceedings, and when the syndic filed his tableau of distribution, they made opposition on various grounds, but claimed to be placed on the tableau because they were owners of one-fourth of the steam-boat, and consequently entitled to one-fourth part of the insurance thereon.

The district judge sustained the opposition on this ground, and ordered the tableau to be amended, and that they be paid accordingly. The syndic appealed.

Preston, in propria personâ, as syndic and appellant.

Castera, for the opponents, Leflicher, E. Leon Bernard, and G. Julien.

Eustis, J., delivered the opinion of the court.

Claiborne, Mather and Leflicher, were the owners of a steam-boat called the Marmora; the former was the owner of one-half, and the two latter of one-fourth each. The boat was destroyed by fire: she was insured for forty thousand dollars. Claiborne and Mather made a cession of property, transferring to their creditors their interest in the policies of insurance. Leflicher and the assignees of a part of his interest, brought suit against the insurers for his one-fourth of the amount of the insurance. There were other suits which were cumulated with the proceedings of the insolvents, and by a decree of the court, with the consent of the parties, all these suits were consolidated. The effect of this decree, is to make, in point of fact, one suit. Leflicher and the

assignees, became parties to the insolvent proceedings, and we must consider the whole fund as in court, for the purpose of distribution.

The judge of the District Court, on the opposition to the tableau of distribution of the funds made by Leflicher and his assignees, gave them judgment for the proportion of Leflicher's interest in the amount of the insurance, to wit: one-fourth, and gave the creditors of the steam-boat the other three-fourths, and ordered the tableau to be amended accordingly. From this judgment the syndics of the creditors appealed.

This claim of Leflicher and his assignees, for his proportion of the fund, may be considered as involving a demand for a partition and settlement of the partnership concerns. In the article of the Louisiana Code 2861, the rules concerning the partition of inheritances, and the obligations which result from the same, between the heirs, apply to partners. In partition of inheritances, the payment of the debts is the first step taken. Even those due to the heirs who may have paid the debts of the succession, are to be deducted from the active mass before any partition takes place.

We consider that Claiborne, Mather and Leflicher, were commercial partners, and that the funds under the control of the court, are partnership funds, and must be first applied to the payment of the partnership debts, in preference to those of the individual debtor. *Louisiana Code, 2794.* By the tableau, the funds in hand would pay no more than sixty-five per cent. of the debts of the partnership; no part of them can go into the hands of Leflicher, until the partnership debts are paid: the same reason prevents his private creditors from receiving any portion of them until that event.

The judgment of the District Court is, therefore, reversed, and the cause remanded for further proceedings, with directions to the judge to settle and determine the claims of Leflicher, and E. Leon Bernard and Julien, as set forth in their opposition, according to the principles established in this decree.

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CLAIBORNE ET AL
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The owners of steam boats carrying freight and passengers, are commercial partners; and in liquidating the partnership affairs, when some of the partners are insolvent, the other partner cannot withdraw his proportion of the proceeds of the steam boat, until the partnership debts are first paid.

The proceeds of insurance on a lost steam boat, owned by several partners, are partnership funds, and must be first applied to the payment of partnership debts, in preference to those of the individual owners or partners.

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EDMONSON
VS.
 MISS. AND ALA. RAIL ROAD CO. EDMONSON *VS.* MISSISSIPPI AND ALABAMA RAIL ROAD COMP^y.
 APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.

A curator *ad hoc*, appointed to represent an absent defendant, has no capacity or authority to waive prospectively in behalf of his client, the production of legal evidence, and he cannot bind him, by agreeing to dispense with the forms required by law in taking evidence.

The certificate of the governor, that the justice of the peace before whom certain testimony was taken on commission, was commissioned as such at the time, is insufficient to authenticate the evidence, or a document which the governor never saw, and was ignorant of its existence.

This is an attachment suit by a resident of the state of Mississippi, against the Mississippi and Alabama Rail Road Company; a corporation established by law, and located at Brandon, in said state.

The plaintiff alleges, that the defendants are indebted to him in the sum of ten thousand dollars, for this amount of their bank notes, which he holds, and which they refuse to pay in the lawful money of the United States. He prays an attachment against certain property or effects of the defendants in this state, and for judgment for the amount of his demand and costs.

The attachments were levied on several individuals as garnishees, who were also cited to answer on oath in relation to the funds of the defendants in their hands.

A curator *ad hoc* was appointed to defend the suit.

On the trial, the plaintiff offered in evidence the certificates of protest of the notes sued on, purporting to be in the state of Mississippi, by W. C. Harper, as a justice of the peace and notary, which were objected to by the counsel for the defendants, on the ground that there was no proof of his official capacity or character, or of his signature; the plaintiff also offered in evidence the following agreement of the curator *ad hoc*, in relation to the formalities in taking the testimony offered.

"It is agreed that a commission may issue in this case addressed to any judge or justice of the peace, in the town of Brandon, or in Rankin county, Mississippi; and other proof of his official capacity than his own certificate is waived; and it is further agreed, that if the testimony of any justice of the peace, or notary public, should be taken under said commission, other proof of the official capacity of any such justice than his own oath, in answer to interrogatories shall be dispensed with, and not required on the trial of the cause." Signed by the curator.

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RAIL ROAD CO.

The following certificate was also offered in evidence by the plaintiff:

"By A. G. M'Nutt, governor of the state of Mississippi: to all who shall see these presents. Be it known, that W. C. Harper, was an acting justice of the peace, and *ex-officio* notary public, on the 5th May, 1838, in and for the county of Rankin, and that full faith and credit are due to all his acts as such.

"Given under my hand, &c. at Jackson, this 22d day of October, 1838. A. G. M'NUTT.

"By the governor,

"BARRY W. BENSON, *Secretary of State.*"

All this evidence was objected to by the defendant's counsel; the agreement of the curator *ad hoc*, because the court had no right to appoint one until the expiration of ten days after issuing citation, and that the curator was without authority to make such admissions as were contained in the agreement; and to the certificate of the governor, because not annexed to the commission to show the person to be the same person that executed it, &c. The court admitted this evidence, and the defendant's counsel took his bills of exception.

The plaintiff had a verdict and judgment for the amount of his claim, interest and costs; the defendants appealed.

G. B. Duncan, for the plaintiff.

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Strawbridge, for the defendants.

Rost, J., delivered the opinion of the court.

The plaintiff sued out an attachment against a large amount of bank notes, issued in the usual form by the defendants, who are a corporation having banking privileges, established in the state of Mississippi. Several garnishees were ordered to answer interrogatories on facts and articles, and some of them answered that they had in their possession cotton, to an amount more than sufficient to satisfy the claim.

The defendants came into court, filed a general denial and alleged, that the claim of the plaintiff had been attached at the suit of Hyde & Goodrich. The plaintiff obtained judgment in the first instance, and the defendants appealed.

The appellants have alleged in this court, that there is error in the admission of the evidence upon which the case was tried, as exhibited by their several bills of exception, which were taken to the opinion of the court.

I. Admitting in evidence certificates of protest, on the ground that there was no proof of the signature or capacity of the notary who made them.

II. To the admission of evidence taken under commission, on the ground that there was no proof of the signature or capacity of the person before whom it was taken.

III. That the certificate of the governor of the state of Mississippi was not attached to the commission, and did not authenticate the same as the act of the person who signed it.

IV. That the curator *ad hoc*, appointed at the beginning by the court, to represent the absent defendants, had no capacity to waive prospectively in behalf of his client the production of legal evidence, in the manner he did.

A curator *ad hoc*, appointed to represent an absent defendant, has no capacity or authority to waive prospectively in behalf of his client, the production of legal evidence; and he cannot bind him, by agreeing to dispense with the forms required by law in taking evidence.

We are of opinion, that these exceptions were well taken; the counsel appointed to represent the absent defendants, could not bind him not to require at any subsequent time, evidence of the judicial capacity of any judge or justice of the peace of the county of Rankin, in the state of Mississippi, to whom a commission in the suit might be sent; nor

could he make him promise that he would never ask any other proof of the official capacity of any notary examined under such commissions, but his own oath to those facts. Upon a specific commission, and with a view to save costs and to speed the administration of justice, the counsel might well have dispensed with proof of those facts in reference to particular persons known to him; but the agreement is too general, and being made without any apparent necessity or cause shown, cannot affect the legal rights of the defendants.

Without this admission, there is no proof of the demand of payment, from which alone interest can commence to run.

The separate certificate of the governor, that when the evidence was taken, W. C. Harper was a justice of the peace and notary public in the same county, is insufficient, and cannot authenticate a document which the governor never saw, and of the existence of which he was ignorant.

We are of opinion, that the evidence ought not to have been admitted, and that the case must on that account be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and the case remanded for a new trial, with directions to the judge to proceed therein according to law, and in conformity with the opinion of this court; the appellees paying the costs of this appeal.

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RAIL ROAD CO.

The certificate of the governor, that the justice of the peace before whom certain testimony was taken on commission, was commissioned as such at the time, is insufficient to authenticate the evidence, or a document which the governor never saw, and was ignorant of its existence.

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BURNS VS. SCHAUMBERG.

**BURNS
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SCHAUMBERG.****APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

The amicable demand is admitted, by the failure of the defendant to answer an interrogatory put to him, to that effect.

This is an action against the defendant, as endorser of a promissory note. Suit was first instituted before the City Court of New-Orleans, in which the plaintiff had judgment, and the defendant appealed to the Parish Court for the parish of New-Orleans. On the trial in the first instance, the defendant insisted on his exception, that the plaintiff had brought another suit on this same note, which is still pending, and the costs unpaid, in consequence of which he was precluded from prosecuting the present one. The plaintiff produced witnesses to prove that he had paid the costs in the previous suit, which was objected to by defendant's counsel, but the testimony was received and he took his bill of exceptions.

The parish judge was of opinion the plaintiff had made out his case, by proving protest and due notice to the defendant of the non-payment of the note. Judgment was given against him, and he appealed to this court.

Randall, for the appellee.

Bartlett, for the defendant and appellant.

Rost, J., delivered the opinion of the court.

The defendant is sued as endorser of a promissory note, and the petition contains the usual averments of protest and notice.

The defendant admitted the execution of the note, but denied the ownership of the plaintiff, and alleged that no amicable demand had been made. The amicable demand is admitted by the failure of the defendant to answer the interrogatory put to him to that effect. The protest and notice are proved, and we see nothing in the bills of exception taken

by the defendant's counsel, which can avail him. The payment of the costs in a previous suit, could be proved by witnesses. The judgment rendered against him in the Parish Court, must be affirmed.

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VS.
BACH.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

BAHAM VS. BACH.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.

Auctioneers are public officers, and in making public sales are bound to have from the seller or owner of the property, the terms and conditions in writing, which they are to proclaim in a loud and audible voice to the bystanders, and to offer the property publicly for sale.

From the time the auctioneer declares the highest bidder to be the purchaser, and the thing sold is adjudicated to him, the contract is subjected to the same rules which govern the ordinary contract of sale.

Combinations at auction sales, to enhance the price by false bids, or depress it by false assertions, are artifices which invalidate the contract, when practised by those who are parties to it.

The owner of property may withdraw it before the highest bid is accepted by the auctioneer, but he has no right to bid himself, unless he publicly reserves this right; still less can he bid through the auctioneer.

So, where the price of property was limited, which fact was not communicated to the bidders, and the auctioneer advanced on the bid, until it reached the limits prescribed by the owner, and was adjudicated to the defendant: *Held*, that the sale was null and void as to the purchaser.

The plaintiff sues to compel the defendant to comply with the terms of an auction sale and adjudication of certain lots

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It is shown by the evidence that the plaintiff, the wife of L. Lesassier, was owner of certain lots of ground in the faubourg Livaudais, and being desirous of selling a portion of them, on the 6th March, 1837, advertised for sale four lots, describing them minutely, and, also, referring to a plan of them, which was to be exhibited on the day of sale; and likewise fixed the day on which they were to be sold at public auction.

At the time and place of sale, the defendant, Bach, who it appears was well acquainted with the adjacent ground, attended and bid at the sale. The auctioneer, it seems, had received written instructions from the husband of the plaintiff, by which the lots were limited at the price of two thousand dollars each. But these instructions were not communicated to the bystanders or bidders. The defendant bid off three lots, one at two thousand and fifty dollars, the other two at two thousand dollars each. He has since refused to take them or comply with the sale, because there was no actual bidders besides himself, and that agents or puffers, were employed to bid against him.

The auctioneer who made the sale, deposed that he advanced on the bids made by others, until he run them up to the limitation, in pursuance of his written instructions. The defendant was the last and highest bidder for the lots in question.

On this evidence and state of the case, the district judge was of opinion the plaintiff ought not to take any thing by her suit. Judgment was given for the defendant, and the plaintiff appealed.

L. C. Duncan, for the plaintiff.

Preston, contra.

Eustis, J., delivered the opinion of the court.

The petitioner alleges, that with the authority of her hus-

band, she sold certain lots of ground to the defendant at public auction; that she has signed and tendered to him an authentic act of sale of the property, which he refuses to execute. She prays that the sale at auction be decreed good and valid; that the defendant be ordered to accept and execute the act, and to pay the price and comply with the conditions of the sale.

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The defendant, among other matters of defence, charges that the plaintiff, by her agents, bid against him at the sale at auction, and run up the property greatly beyond the bids of the real bidders: he prays for judgment and for general relief against the doings of the plaintiff.

The auctioneer stated in his examination, that the lots were limited to the sum of two thousand dollars each; that this was not communicated to the bidders, and that he advanced on the bids made by others, as we understand him, up to that sum; that it is customary for auctioneers, when they put up property which is limited, to start the sales and rise on their own bids, till they reach the limits prescribed by the owner.

There were many real bids besides that of the defendant; and in relation to the bidding off the property, there is nothing which affects the validity of the sale, except the fact of his bidding for the owner, as declared by him.

There was judgment for the defendant, and the plaintiff has appealed.

Our own code has provided, in express terms, for the manner in which sales at auction are to be conducted.

The auctioneer is a public officer: he is bound to have from the seller the terms and conditions of the sale in writing, to proclaim them at the sale in a loud and audible voice, and to offer the property publicly for sale. He is bound to receive the bids, and after waiting a reasonable time to ascertain the highest bid, he is bound to declare the person making it, to be the purchaser, and the thing sold is adjudicated to him. From that time the contract is subjected to the same rules which govern the ordinary contract of sale.

Auctioneers are public officers, and in making public sales are bound to have from the seller or owner of the property, the terms and conditions in writing, which they are to proclaim in a loud and audible voice to the bystanders, and to offer the property publicly for sale.

Louisiana Code, articles 2584, 2585, 2586.

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From the time the auctioneer declares the highest bidder to be the purchaser, and the thing sold is adjudicated to him, the contract is subjected to the same rules which govern the ordinary contract of sale.

Combinations at auction sales, to enhance the price by false bids, or depress it by false assertions, are artifices which invalidate the contract, while practiced by those who are parties to it.

The owner of property may withdraw it before the highest bid is accepted by the auctioneer, but he has no right to bid himself, unless he publicly reserves this right; still less can he bid through the auctioneer.

In section 12, article 1841, it is provided, that combinations with respect "to sales to enhance the price by false bids or offers, or to depress it by false assertions, are artifices which invalidate the contract, when practiced by those who are parties to it, or give rise to an action of damages when they are not."

This provision of our laws, is in harmony with the principles first established on this subject in England, by Lord Mansfield, in the case of *Roxwell vs. Christie*, *Cowp.* 395. As was observed, subsequently, by Lord Kenyon, "the whole of the reasoning in that case is founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man."

The decision in that case has not been followed in all cases, either in the jurisprudence of England or of the United States, but we apprehend that time and scrutiny will re-establish its force, wherever the principles of law and public morals are coincident.

As late as 1827, Lord Tenterden, in a case where the owner employed one person to bid for him, and he was only ordered to bid up to a certain sum, said: "I will add that the strong indication of my opinion is, that if only one person be employed to bid, with a view to save the auction duty, the sale is void; unless it be announced that there is a person bidding for the owner, the act itself is fraudulent." 1 *Moody and Malkin*, 129; 22 *English Common Law Reports*, 268. 1 *Story's Equity Jurisprudence*, section 298, and cases there cited.

In the case of *Correjolles vs. Mossy*, 2 *Louisiana Reports*, 507, the Supreme Court of this State, held that an owner might withdraw his property before the highest bid was accepted by the auctioneer. But this gives the owner no right to bid, unless he publicly reserves to himself that right; still less can he bid through the auctioneer. The duty of the auctioneer is to sell the property and to receive the bids offered, not to make them.

We do not censure the conduct of the auctioneer in this instance, because we are aware it is the general usage to

conduct sales at auction in this manner ; but it is an usage which we can neither justify nor recognize in the administration of justice. It is equally repugnant to public policy and to that fairness which ought to exist, and which people have a right to expect, in a sale of property avowedly offered to the highest bidder.

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vs.
NICHOLS.

Our opinion on this subject, renders it unnecessary to examine the other question raised by the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

NICHOLS ET AL. vs. NICHOLS.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS, JUDGE DUNCAN
PRESIDING.

This appeal was considered as taken for the purposes of vexation and delay alone, and the judgment is affirmed with the maximum of damages.

This is an appeal taken from a judgment of the City Court, dissolving an injunction, which the plaintiff, N. Nichols, the father, had obtained to enjoin an execution which R. Nichols, his son, had issued against him, and was proceeding to seize and sell his property. On the trial of a rule taken to show cause why the injunction should not be dissolved, it turned out in evidence, that all the grounds on which it was granted, were not only unsupported by evidence, but on the contrary, were shown to be *untrue*. The injunction was dissolved with twenty per centum damages, and the plaintiff, and his surety therein, appealed.

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NICHOLS ET AL.vs.
NICHOLS,*M'Millen*, for the appellant.*N. Pierse, contra.**Rost, J.*, delivered the opinion of the court.

The plaintiff, N. Nichols, enjoined the execution of a judgment rendered against him in favor of the defendant, on the ground that he had a claim to compensate against it, and that he had appealed, and the appeal was still pending. The defendant took a rule upon the plaintiff, to show cause why the injunction should not be dissolved, and the plaintiff adjudged to pay damages on the following grounds :

I. That the matters set up in the petition had been pleaded in the original suit, and could no longer avail the plaintiff.

II. That the appeal taken in the former suit had not been prosecuted, as shown by the certificate of the clerk of the Supreme Court, anterior in date to the execution enjoined by the plaintiff.

The rule was tried, and the grounds assumed by the defendant being fully sustained by the evidence adduced, the judge dissolved the injunction and condemned the plaintiff and his surety to pay *in solido*, to the defendant, twenty per cent. damages. From this judgment they have appealed.

We see nothing upon which their hope of success could be founded, and we are satisfied that the appeal was taken for the purposes of vexation and delay, and if it is considered that the plaintiff is the son of the defendant, little will be found in the circumstances of this case to recommend him to the indulgence of the court. The defendant is entitled to the damages he has asked.

It is, therefore, ordered, adjudged and decreed, that the judgment of the City Court be affirmed with costs, and ten per cent. damages, for a frivolous appeal.

GRAVILLON vs. RICHARD'S EXECUTOR ET AL.

EASTERN DIST.
April, 1839.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

GRAVILLON
vs.
RICHARD'S EX'OR.
ET AL.

Where a person absconded from his creditors in France, and came to the United States, with a view of bettering his condition; and arriving in Louisiana, soon afterwards died, and his succession opened and administered here; *Held*, that no other domicil can be assigned but his original one in France, as he did not appear to have had any idea of establishing himself in Louisiana.

131 293
46 358

13 293
109 1007

The fact of a person remaining in a foreign country, without any intention of establishing himself there, does not operate a change of his domicil. But as soon as the will of making a permanent establishment in the country, combined with the fact of his residence, even for a few days, fixes the domicil.

Although exiles have two domicils, in one sense, yet as to their successions the original domicil is regarded as the true one. In questions of doubt the original domicil is to be considered the true one.

The power of our courts to order the remission of funds belonging to a foreign succession opened here, to the representatives and creditors authorized to receive them by the courts of the domicil of the deceased, is undoubted; and every motive of public policy requires such transmission for distribution, etc.

This is an action instituted in the Court of Probates, for the city and parish of New-Orleans, by Jean Claude Gravillon, of the city of New-York, attorney in fact of the syndics of the creditors, and of the curator of the vacant estate of a person calling himself Etienne Richard, whose real name is Ennemond Richard Lioud, a native of France, lately residing and doing business at Annonay, in the kingdom of France, but who came to New-Orleans, by the way of New-York, in the beginning of the year 1837, and died. The deceased left a will, in which he appointed N. B. Le Breton, of this city, his testamentary executor, and instituted Charles Francois David Richard Chamberet, of St. Chamond, department of the Loire, in France, his universal legatee. His succession was opened in New-Orleans, and duly administered by

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the executor, who rendered his account, after having placed on his tableau all the debts and legacies due to individuals in the United States, known to him, which was homologated. This account showed a balance in the executor's hands, in money and credits, not exceeding thirty-five thousand dollars.

The petitioner shows, that the deceased was a merchant at Annonay, in France, and failed for a very large amount, in 1837, absconded from his creditors, and came to New-York, and from there to New-Orleans, where he died, the 22d June, 1837. The petitioner, residing in New-York, is duly authorized, by a power of attorney executed by the syndics in France, and the curator of the vacant estate of the deceased there, with authority to appoint a substitute, or attorney, in New-Orleans, to receive the proceeds of his succession, and transmit them to France, for the benefit of the creditors, all of whom reside there; and that he has substituted Mr. Joseph Albert, of New-Orleans, to receive for him said funds. He prays that the executor, and attorney appointed to represent the absent heirs, be cited, and after due proceedings had, that he be recognized as the duly authorized agent of all the creditors of the deceased, and that the proceeds of the succession be paid over to his substitute for their benefit accordingly.

The executor avowed himself ready to pay over the funds and effects in his hands to such person as the court should authorize to receive them.

The judge of the Court of Probates, from all the evidence before him, considered the question of the place of domicile of the deceased as very doubtful, but as he dwelt in Louisiana *animo manendi*, it was sufficient to authorize the conclusion that this was the place of domicile.

The Probate Court further decided, that it was charged with the supervision of the estates of deceased persons, whose successions were opened here, it should apply to their administration and distribution the provisions of the laws of Louisiana. That according to this view of the case, the present applicant could derive no aid to his pretensions, either from the principles of international law, or the comity existing between foreign and independent nations.

There was judgment rejecting the application of the plaintiff, and decreeing that the funds remain in the hands of the executor, to be distributed according to the laws of Louisiana. The plaintiff appealed.

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Benjamin, for the plaintiff.

1. There can be no doubt, under our law, that if plaintiff had been appointed attorney in fact of the creditors, by authentic act of creditors entitled to a sum exceeding the balance in the executor's hands, he would have been bound to pay them that balance: both our codes so provide. Now all the parties reside in France; the plaintiffs are not attorneys in fact, appointed by the creditors, by *an act before a notary public*, but they are the attorneys in fact of the syndics, appointed by proceedings before a *judicial tribunal*, viz., the tribunal of commerce. Surely this judicial tribunal is entitled to as much weight as a notary's act. The judge is an officer of equal dignity with the notary. The judicial mandate in this case is more solemn in its character, and more authentic in its form, than the verbal power of attorney passed before a notary.

2. But if wrong on this point, we are agents of the succession in France. France was the place of deceased's domicile; all the parties interested in his succession reside there. All persons in the United States have been satisfied; and so far as the balance of assets in the executor's hands are concerned, as this balance is to be distributed amongst debtors in France, where the debtors reside, and where the failure was opened, and all interested parties are represented, the succession here is clearly the *ancillary* succession, and that in France the *principal* one. Our citizens having been protected, the comity of nations requires that the funds remaining here should be distributed in France amongst the parties interested there. *Story on Conflict of Laws*, sections 422-3. *Harvey vs. Richards*, 1 *Mason*, 407. *Dawes vs. Head et al.*, 3 *Pickering*, 141.

3. Finally, if we regard the justice of the case, it is clear that it will be reached more certainly by a distribution where all the creditors reside and can prove their debts, than by

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requiring each one to send to New-Orleans the proof of his claim, whereby a large majority of them would probably be deprived of any share of the proceeds, and all the property go to a few of the largest creditors, whose interests are sufficiently great to justify the enormous expense which would be occasioned by such a proceeding.

Derbigny, for the defendants and appellees.

Eustis, J., delivered the opinion of the court.

On the 22d of June, 1837, a person calling himself Etienne Richard, died in the city of New-Orleans, leaving a will, in which he appointed N. B. Le Breton his executor, and instituted as his universal legatee, Charles François David Richard Chamberet, of St. Chamond, department of the Loire, in the kingdom of France. On receiving information of this testamentary disposition, the legatee, by a declaration at the *greffe* of the tribunal of the first instance, sitting at Tournon, in the department of L'Ardeche, acknowledged the deceased to have been his brother; that in his life time he had been in trade at Annonay, and had left France in 1837; that he, the legatee, refused to avail himself of the provisions of the will, as the property of his deceased brother rightly belonged to his creditors, whose debts, the property left by him in France was insufficient to satisfy. The legacy was renounced in due form.

By a judgment of the tribunal of commerce sitting at Annonay, department of L'Ardeche, rendered on the 3d February, 1837, the deceased had been declared to be in a state of bankruptcy, and provisional syndics were, in March afterwards, appointed to his estate. On the 7th of August, definitive syndics were appointed. At the instance of the definitive syndics, Jacques Chapius, notary at Annonay, was appointed by the court of the first instance at Tournon, curator of the vacant succession of the deceased. The syndics, and the curator of the succession, under the sanction of the tribunal of commerce, gave a power of attorney to Jean Claude Gravillon, of the city of New-York, with the usual

authority, to settle the estate of the deceased in Louisiana, and to receive the funds from the executor, N. B. Le Breton. This suit is instituted for the recovery of the funds, by Gravillon, who alleges, that he has substituted Joseph Albert, of New-Orleans, to the powers granted to him under the letter of attorney, and prays, that any funds which he, Gravillon, might be entitled to receive, as the agent of the syndics and curator, may be paid to said Joseph Albert, his substituted attorney.

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The judge of the Court of Probates considered, that he was bound to distribute the estate according to our laws, and determined that the funds could not be remitted to the syndics and curator. He gave judgment for the defendant, and the case comes before us on an appeal.

It appears, that the deceased absconded from his creditors in France, early in the year 1837, and came to the United States, for the purpose of bettering his condition: he was some time in New-York; he arrived in the month of April in New-Orleans, and finally sunk under the load of disappointment and remorse which his conduct brought upon him.

The year of the executorship having expired, the executor rendered his account, which has been homologated; all the claims on the estate which have been presented, or known to the executor, have been provided for in the account, and a balance of about thirty-five thousand dollars remains in his hands subject to the order of the Court of Probates.

From the evidence, we cannot assign any domicile to the deceased other than his original domicile. He does not appear to have had any idea of establishing himself in Louisiana; he acquired no real property here, his principal investments of money were in New-York, and there is no act from which such an intention is to be inferred.

The fact of a person remaining in a foreign country, without any intention of establishing himself there, does not operate a change of his domicile; but as soon as the will of making a permanent establishment in the country is combined with the fact of his residence, the residence even for a

The fact of a person remaining in a foreign country without any intention of establishing himself there, does not operate a change of his domicile: but as soon as the will of making a permanent establishment in the country, combined with the fact of his residence, even for a few days, fixes the domicile.

EASTERN DIST. few days fixes the domicile. *D'Argentrée, on article 449 of the Custom of Brittany.* 8 *Cranch's Reports*, 279.

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Although exiles have two domicils in one sense, yet as to their succession, the original domicile is regarded as the true one. In questions of doubt, the original domicile is to be considered the true one.

The President Bouhier, (chapter 22, number 207,) says, that though exiles have two domicils, in one sense, yet as to their successions, the domicile they had at the time of their condemnation is only to be regarded, as the other domicile is occasional and involuntary.

The judge of the Court of Probates considered the question of domicile very doubtful. The solution of questions of this kind is often attended with great difficulty. Merlin, on this subject, says that in questions of doubt the original domicile is to be considered as the true domicile. *Merlin's Repertoire du Jurisprudence, verbo Domicile.*

For all the purposes of this inquiry, we must consider the domicile of the deceased to have been in France at the time of his death.

None of the creditors of the deceased in France have resorted to the tribunals of this state for the enforcement of their debts. There are no creditors here to be satisfied out of the funds of the estate. The creditors in France have addressed themselves to the tribunals of that country for the distribution of the funds, which must necessarily be made according to the laws of France. They have virtually repudiated a distribution under our laws. There can be no doubt as to the existence of debts of the deceased to a large amount in France. His letters establish that fact beyond controversy, independently of the judicial proceedings of the creditors in France, and the action of the tribunals on them. There is no motive of public policy, under these circumstances, adverse to the transmission of the funds to France for distribution. The power of courts to order the remission of the funds belonging to a foreign succession to the representatives of the succession authorized to receive them by the courts of the domicile of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a consequence of that comity which prevails between nations in amity with each other. The interests of commerce and of civilization require

The power of our courts to order the remission of funds belonging to a foreign succession, opened here to the representatives and creditors authorized to receive them, by the courts of the domicile of the deceased, is undoubted; and every motive of public policy requires such transmission for distribution, &c.

that this comity should be carried into effect by our tribunals. It is done in England, and in other states of the Union, in analogous and similar cases, and whenever the rights of our citizens are not affected by the act to be done, we shall feel ourselves bound to act on a principle which is impressed upon us equally by an enlightened policy, and a certainty that it will tend to the great purposes of justice. For the decisions on this important question, see 1 *H. Blackstone*, 131, 132, *note*; 1 *Mason's Reports*, 381; *Story's Conflict of Laws*, section 513; and above all, the opinion of Chief Justice Parker, in the case of *Daves vs. Head*, 3 *Pickering's Reports*, 128.

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We therefore determine, that as the interests of no one will be injured thereby, that the Court of Probates ought to have placed the funds of the estate at the disposal of the syndics and curator of the vacant estate, for the purpose of their being transmitted to the place of domicile of the deceased, for distribution.

The power of attorney to Gravillon, sanctioned by the tribunal of commerce sitting at Annonay, contains a clause of substitution. The transmission of funds abroad in a case of this kind is a matter of comity, and not assimilated in any manner to a payment, which could be made to an attorney at law. We cannot order these funds to be sent to New-York, and they can be handed over to no one but a person authorized by proper authority to receive them. They must be paid to the attorney in fact, recognized as such by the Court of Probates, and to no one else. Gravillon has by an authentic act substituted Joseph Albert, of the city of New-Orleans, to his powers, under the power of attorney to him—

It is, therefore, ordered, that the executor deliver to Joseph Albert, of New-Orleans, the funds in his hands belonging to the succession of the late Etienne Richard, (so called,) as the attorney in fact of the syndics and curator of the vacant succession of the late Ennemond Richard Lioud, otherwise called Etienne Richard, to be by him the said attorney in

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fact remitted to the said syndics and curator, in the kingdom of France, there to be distributed among the creditors of the said Lioud, *alias* Richard, according to the laws of France, and that the appellee pay the costs of this appeal.

VIGERS ET AL. VS. SAINET.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

An unincorporated association was formed, of the stockholders of the steamer Cuba, which appointed commissioners, with authority to raise money, on pledge, bottomry, or mortgage, and they executed their note for five thousand dollars, on the hypothecation of the boat, which was negotiated, and the holder sued the defendant alone, as one of the stockholders; *Held*, that he was liable as such, individually, for the amount of the note.

Stockholders, in unincorporated companies, are liable in the same manner as other partnerships. So, partnerships or unincorporated companies, for the purchase and sale of personal property, and for carrying it for hire in ships or other vessels, are commercial partnerships, and the stockholders are liable *in solido* for the debts of the company.

This is an action to recover from the defendant, as a stockholder or co-proprietor of the steam ship Cuba, the amount of the following note given by the commissioners appointed by the company to raise money and act as its agents.

“NEW-ORLEANS, October 26th, 1837.

Six months after date, the commissioners of the stockholders of the steam ship Cuba, promise to pay to the order of John Whitehead, president of the Eagle Insurance Company, five thousand dollars, value received.”

[Signed by the commissioners, and endorsed by the payee.]

On its face the note was paraphed, "*ne varietur* ; secured by mortgage, by act of even date herewith."

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F. GRIMA, *Notary Public.*"

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When the note became due, it was not paid, and the plaintiffs, as holders, sued the defendant, as one of the stockholders, for the amount of the principal, interest and costs.

The defendant averred, that he could not be sued in the form and manner stated in the petition, he not being one of the subscribers to the note sued on ; and that the steamer Cuba was not owned by a commercial partnership.

The cause was on these issues tried by the court. It was shown by the evidence that the steam ship Cuba was owned by an unincorporated company or association of individuals, as stockholders, and that the defendant was a stockholder in said company. It also appeared that Placide Forstall, Michael Moore, and Joachim Kohn, were duly appointed commissioners, with plenary powers to raise money, and hypothecate the steam ship Cuba for the payment thereof, and that they did borrow the sum expressed in the note sued on, from the Eagle Insurance Company, and hypothecated the vessel accordingly, which money so raised was for the use of the company.

In pronouncing judgment, the district judge summed up the case as follows :

"The Cuba was built by subscription, and was run as a packet between New-Orleans and Havana, by the subscribers. Three commissioners, selected by the stockholders or co-proprietors from among themselves, managed the concerns of the vessel, and signed the obligation sued on.

The partnership thus formed and carried on was a commercial one ; the Cuba being employed in carrying personal property for hire. *Louisiana Code, article 2796.*

It is contended by the defendant, that the partnership was of that kind styled by our code, a partnership *in commendum*. But I am unable to perceive any feature of such a partnership in the present case. It neither answers the definition as given in article 2810, nor has it been clothed with the forms required by article 2817.

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I conclude, therefore, in conformity to article 2816, that the defendant is bound for the debt sued upon, jointly and severally with his co-partners in the steam ship Cuba.

It is, therefore, ordered, adjudged and decreed, that Wm. F. Vigers & Company recover of Emile Sainet five thousand and three dollars, with legal interest on five thousand dollars from the 28th April, 1838, until paid, and costs."

From this judgment the defendant appealed.

Lockett and Micou, for the plaintiffs.

Canon, contra.

Eustis, J., delivered the opinion of the court.

The plaintiffs sue as the holders of a promissory note, signed by Placide Forstall, Michael Moore, and Joachim Kohn, commissioners; in the body of the note, they are described to be the commissioners of the stockholders of the steam ship Cuba. The petition charges, that the defendant, as one of the stockholders, is liable for the amount of the note, as the commissioners had authority to give notes for, and bind the stockholders by contract, and that the stockholders and owners of the steamer Cuba constitute under our laws a commercial partnership. The defendant is sued alone, and is sought to be made liable for the whole amount of the debt.

The defendant denied that he could be sued in the manner and form stated in the petition, he not being one of the subscribers to the promissory note sued on, and the Cuba not belonging to a commercial partnership.

On these pleadings judgment was rendered for the plaintiffs, and the defendant has appealed.

It appears that an unincorporated association existed in this city, of whom the three signers of the note in question were commissioners; they were authorized to receive a title to the steamer Cuba, which had been previously purchased, and were authorized to borrow the requisite money to meet the obligations of the company, on pledge, bottomry or mortgage.

They borrowed the amount of the note sued on, (five thousand dollars,) from the Eagle Insurance Company, on an hypothecation of the boat, and this note was delivered to the creditor, from whom the plaintiff received it.

The defendant was a stockholder in the company, and the commissioners were authorized to issue the note, and the defendant is bound by it: the question is, to what extent?

Unincorporated companies are on precisely the same footing, as to the liabilities of the parties, as other partnerships. *See on Partnership, pages 2 and 19.* Partnerships for the purchase and sale of personal property, and for carrying personal property for hire in ships or other vessels, are commercial partnerships, by our laws. *Louisiana Code, 2796.* It appears by the books of the company, that they bought and sold fruit, an usual article of commerce between this port and the Havana, between which ports the steamer Cuba plied, and that part of their earnings were from freight.

On this evidence, we are bound to consider the partnership as a commercial one, and the stockholders bound *in solido* for the debts of the company.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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Stockholders in unincorporated companies are liable in the same manner as other partnerships. So, partnerships or unincorporated companies for the purchase and sale of personal property, and for carrying it for hire in ships or other vessels, are commercial partnerships, and the stockholders are liable *in solido* for the debts of the company.

SANFORD ET AL. vs. PYNE ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

The agent of the creditor must swear to the indebtedness of the defendant from his personal and direct knowledge, to obtain an order of arrest, and not from what he may have heard from any other person whatever.

EASTERN DIST. In this case an appeal was taken from an order of the
April, 1839. judge *a quo*, setting aside an order of arrest.

SANTFORD ET AL. This is an action to recover the sum of seven hundred and
vs. forty-three dollars, with interest due to the plaintiffs, who,
PYNE ET AL. together with the defendants, reside in the state of Alabama.

One of the defendants was arrested and held to bail on the following affidavit :

“W. M. Goodrich, agent of the plaintiffs, being sworn, deposes that Pyne, one of the commercial firm of Pyne and Huntington, is justly indebted to said plaintiffs, in the sum of seven hundred and forty-three dollars, which is now due and payable ; that deponent verily believes that said Pyne is about to remove from the state, without leaving in it sufficient property to satisfy this demand,” &c.

On the 23th of December, 1837, a rule was taken on the plaintiff to show cause why the order of arrest should not be set aside, on the ground that the affidavit is insufficient, and that the agent was not authorized to make the affidavit on which the writ of arrest issued.

On the 18th December, a judgment by default was taken, and confirmed and made final on the 23d, and signed on the 3d of January following. On the 27th December, the plaintiffs filed a supplemental petition, praying for an attachment. The counsel for the defendant, Pyne, put in his answer the 6th January afterwards. On the same day, the rule was tried, and it was ordered, that the writ of arrest be maintained. A like proceeding was had on the attachment. A second rule was taken for a new trial, and the cause was opened. On the second trial, evidence was taken to show that the agent had no knowledge of his own of the indebtedness of the defendants.

Goodrich, the agent, was called as a witness, and stated that he derived all his knowledge of the debt sued on from a gentleman by the name of Henry, and in a letter from the plaintiff, and also in a conversation with one of the plaintiffs, but he does not know the signature of the defendants, and never saw either of them.

On hearing the parties, the parish judge ordered the writ of arrest to be set aside, and the plaintiffs appealed.

I. W. Smith, for the plaintiffs and appellants, contended : EASTERN DIST.

1. The order of arrest was improperly set aside. The affidavit contains all the facts required by the Code of Practice, articles 214, 215. The want of knowledge in the agent is not one of the facts which can be put at issue in this summary way ; it must be pleaded in abatement. *Ibid.*, 218. 1 *Martin's Digest*, 478, 480. 2 *Martin's Reports*, 243. *Ibid.*, 246.

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2. The bill of exceptions was well taken. The insufficiency of the affidavit alleged in the first rule was not limited to matter apparent on the face of the affidavit. The judgment declares the affidavit sufficient. The second rule rests on a special ground of insufficiency of the same affidavit. The first judgment operated *res judicata* against the second rule. The two judgments are opposed to each other. 1 *Starkie on Evidence*, page 197.

3. In deciding upon the second rule, the Parish Court disregarded the last clause of the 215th article of the Code of Practice. It is sufficient that the agent derived his knowledge from other sources than the plaintiffs. The affiant could not disprove his own affidavit. The facts set out in the affidavit formed part of the petition of the plaintiffs. The judgment by default had not been set aside. The signature of the defendants to the notes sued on had been proved. Judgment had been confirmed against them before the second rule was taken. *Code of Practice*, 360.

Chinn, for the defendants, insisted, that the affidavit was insufficient to arrest the defendant. The agent who made it swears that he knew nothing of the indebtedness, of his own direct or personal knowledge. He had heard it from the plaintiffs and others.

Rost, J., delivered the opinion of the court.

This is an appeal from a judgment of the Parish Court, discharging the order of arrest previously given in the suit.

That order was obtained on the affidavit of the plaintiffs' agent, who swore to the indebtedness of the defendants, and

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HUNTER.

that he verily believed that Pyne, one of them, was about to remove from the state, without leaving in it sufficient property to satisfy the plaintiffs' claim.

Upon the motion to set aside the order of arrest, the agent, called in as a witness, declared on oath, that he was informed of the facts to which he swore, by a Mr. Henry, a friend of the plaintiffs, in whom he had great confidence, and that he did receive one or two letters from the plaintiff on the subject; but he stated that he did not know the signatures of the defendants, and had no other knowledge of the debt. The Parish Court properly discharged the order of bail; the agent must swear to the debt, from his personal and direct knowledge of its being due, and not by what he may know or have learned from the creditor he represents. *Code of Practice, article 215.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where an attaching creditor swears that the sum of two thousand three hundred and fifty dollars, *besides interest, damages, &c.*, is due and owing to him, he will be required only to give bond for an amount exceeding by one half the principal sum due, disregarding the *interest and damages* as too indefinite.

Where the petition claims a larger sum, by annexing a fixed rate of damages and interest, than that sworn to in the affidavit on which the attachment had been obtained, it does not thereby invalidate the attachment.

This is an attachment suit, and the case turns solely on the validity of the attachment.

On the 28th April, 1838, Chauncey Powers, a member of the firm of Pope, Powers & Smith, declared on oath, that James Hunter is justly indebted to said firm, in the sum of two thousand three hundred and fifty dollars, besides *interest, damages, &c.* ; that said sum is now due, and that James Hunter resides out of the state of Louisiana.

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The plaintiffs filed a bond for the sum of three thousand six hundred dollars. On the day following the petition was filed, claiming the sum of two thousand three hundred and fifty dollars, with *interest* from protest, and four dollars, *costs* of protest, and *damages*, at the rate of ten per cent.

A rule was taken on the plaintiffs, to show cause why the attachment should not be set aside, on the ground that the attachment bond was insufficient, because it is not for an amount exceeding by one half the sum claimed, which is two thousand three hundred and fifty dollars, with interest from protest, and ten per cent. damages.

On the trial of the rule, upon an intimation from the court that the bond was insufficient, the plaintiffs offered, first, to remit the excess of their claim, so as to bring it within the penalty of the bond ; and also offered to increase the bond, with the same persons as sureties, to the amount that might be required. Both these offers were overruled and rejected by the court, to which the plaintiffs excepted ; and from judgment setting aside the attachment, they appealed.

Elmore and King, for the appellants.

Peyton and T. N. Pierce, *contra*.

Martin, J., delivered the opinion of the court.

This is an attachment suit, and the plaintiff is appellant from the judgment which dismisses it. The attachment was obtained on an affidavit that the sum due was twenty-three hundred and fifty dollars, *besides interest, damages, &c.* The penalty of the bond is thirty-six hundred dollars. On the day following that on which the attachment was obtained, the petition was filed, in which the plaintiff's demand is stated to be twenty-three hundred and fifty dollars, with

EASTERN DIST. interest from protest, and four dollars costs of protest, and
April, 1839. damages at the rate of ten per cent.

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A rule had been taken on the plaintiff, to show cause why the attachment should not be dismissed, on account of the insufficiency of the bond; the plaintiff offered to amend his petition, by reducing his claim to one third of the penalty, or to give a new bond, with the same surety, for the difference between the penalty of the first bond, and a sum exceeding by one half the amount of his claim. This was refused, the rule made absolute, and he appealed.

Where an attaching creditor swears that the sum of twenty-three hundred and fifty dollars, besides interest, damages, &c., is due and owing to him, he will be required only to give bond for an amount exceeding by one half the principal sum due, disregarding the interest and damages as too indefinite.

It appears to us the court erred. The Code of Practice requires the attachment bond to be for a sum exceeding by one half that which is claimed. The bond was taken for a sum exceeding by one half that which was stated in the affidavit to be due. The words *interest, damages, &c.*, being indefinite, must be disregarded, because neither the rate of interest, nor the time from which it runs, are stated. The same may be said of the costs, which, however, are covered by an excess of seventy-five dollars in the sum for which the bond was given, over thirty-five hundred and twenty-five dollars, which is the sum exceeding by one half that sworn to. The bond, therefore, at the time it was given, was sufficient. It is true, that on the next day the petition was filed, in which a larger sum than the one sworn to is claimed. The increase results from an allegation of damages, and a fixation of the rate of interest, and the period from which it began to run.

The law authorizes a plaintiff to obtain an attachment, before he files a petition, for a sum which he swears to be due, provided he gives a bond for a sum exceeding by one half that to which he has sworn. After he has exercised that right, he is to file his petition, and whatever may be the consequence of his claiming a larger sum than that sworn to, this circumstance does not invalidate the attachment. It is now unnecessary for us to say, whether, in such a case, he is estopped from claiming more than the sum sworn to, or whether he may or may not amend his petition.

It is, therefore, ordered, adjudged and decreed, that the

judgment of the Parish Court be annulled, avoided and reversed, and that the rule obtained by the defendant on the plaintiff be discharged, with costs in both courts.

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April, 1839.

GALLIER
VS.
JONAU, F. M. C.

GALLIER vs. JONAU, F. M. C.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

Where an architect enters into a written contract, in a penalty, to erect a block of brick stores and dwellings, *within three months after the granite is put up*, and with the knowledge of a contract between the owner and another person to put up the granite: *Held*, that the epoch when the last granite sills were set, is to be considered the time when the three months began to run, and not when the basement story was completed.

The putting up of the granite windows and doors, cannot be excluded from the contract, but must be considered a part of it, when not expressly reserved by the parties.

This is an action to recover the balance due on a building contract.

The plaintiff is an architect, and entered into a written contract with the defendant, to build a block of brick stores and dwelling houses, in the city of New-Orleans. He alleges, the buildings are completed, and that there is a balance due him of eight thousand seven hundred and twenty-four dollars, according to an account annexed, for which he prays judgment.

The facts of the case are detailed in the following opinion of the district judge.

"The plaintiff credits defendant with forty-four days demurrage in the completion of the work, at thirty dollars per day; the defendant claims one hundred and nine days demurrage.

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The defendant admits the contract, but claims various offsets for work not done by the plaintiff, and also damages for the non-delivery of the building at the time stipulated. The District Court gave judgment in favor of the plaintiff, for the balance claimed by him, and the defendant appealed.

The only question upon which the judgment is attempted to be reversed, arises from this clause found in the contract.

"The said undertaker, (meaning the plaintiff,) binds himself to deliver said buildings finished and complete, keys in hand, three months after the granite, which is to be furnished by the said Jonau, shall have been put up, and in case of delay on his part, to pay as a penalty to the said Jonau, his heirs and assigns, the sum of thirty dollars for each and every day of delay."

The contract made for the putting up of the granite between the defendant and one Richards, is also in evidence.

Where an architect enters into a written contract, in a penalty to erect a block of brick stores and dwellings, within three months after the granite is put up, and with the knowledge of a contract between the owner and another person to put up the granite: *Held*, that the epoch when the last granite window sills were set, is to be considered the time when the three months began to run, and not when the basement story was completed.

It embraces posts and sills for the basement story, together with sills and lintels for all the windows in front, being seventy-five in number. Richards engages to put up the basement story in all the month of December, 1836, the door and window sills to be set as the walls are carried up. The basement story was put up on the 7th January, 1837; the last window sills were set in on the 11th March following; the plaintiff considering this epoch as the time from which the three months allowed him to complete the contract were to run, admits that he was in default from the 12th of June to 25th July, on which day the delivery took place, and he has accordingly charged himself in his account with thirty dollars per day for forty-four days. The defendant contends, that the delay of ninety days commenced on the 7th of January, when the basement story was completed, and that he is entitled to a deduction of thirty dollars per day for one hundred and nine days.

A great number of witnesses were examined in the District Court, without opposition upon the construction which should be put upon such a contract; and their testimony is contradictory; that of Richards, who furnished the granite, appears to us, from the circumstances in which he was

placed, the most important. He says that, in his opinion, it would not have been safe to put up the building within three months after the basement story was finished; he further stated, that in some former cases, where he had put up granite for the plaintiff, there was a misunderstanding between them as to witness's obligation to put up the window sills and lintels. In this case, all misunderstanding was intentionally avoided by a positive stipulation in the contract, that this granite, as well as the basement story, should be put up by the witness. Other witnesses state, that it would have been impossible to complete the building within the time contended for by the defendant. The putting up of the granite of seventy-five windows and doors, cannot be excluded from the contract by us, without an express reservation to that effect by the parties; we are satisfied from all the evidence, that no such reservation was intended.

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NICOLET'S EX'R.
VS.
MOREAU ET AL.

The putting up of the granite windows and doors, cannot be excluded from the contract, but must be considered a part of it, when not expressly reserved by the parties.

We concur in opinion with the district judge, that the three months allowed for the completion of the building commenced to run on the 11th March, 1837, after the last window sill was set. As the plaintiff has allowed the stipulated damages from that day to that of the delivery, we are dispensed from inquiring whether he was regularly put *in mora*; the case appears to us a hard one for him, upon his own admissions.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

NICOLET'S EXECUTOR VS. MOREAU ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the act of sale contains the clause *de non alienando*, the vendor is relieved from the necessity of making the third possessor a party to the executory proceedings, in asserting his mortgage against the mortgaged premises.

EASTERN DIST.

April, 1839.

NICOLET'S EX'N.

VS.

MOREAU ET AL.

This suit commenced by an order of seizure and sale. Nicolet, in his lifetime, had sold a lot of ground to the defendant Moreau, and retained the vendor's mortgage. One of the notes becoming due and remaining unpaid, the executor procured an order of seizure and sale, and the lot in question was adjudicated to one Tremoulet as the highest bidder.

In the meantime, and before the sale by the sheriff, Moreau had sold this lot to one G. T. Weisse, and Tremoulet refused to comply with the terms of sale, as the lot did not appear to be the property of Moreau, against whom the order of seizure and sale issued, and that he could not obtain a good title.

The sale from the plaintiff to Moreau contained the clause *de non alienando*.

On a rule to show cause why he should not comply with the terms of sale, the district judge made the rule absolute, for the following reasons :

"The court having taken this case under consideration, on the rule taken by the plaintiff on A. C. Tremoulet, do for the reasons expressed in the case of *Donaldson vs. Maurin*, 1 *Louisiana Reports*, 39 and 40, order and adjudge, that said rule be made absolute, and that A. C. Tremoulet, purchaser of the property seized and sold in this case by the sheriff, do comply with the terms of the sale, and execute his bond accordingly."

The defendant, Tremoulet, appealed.

Lockett, for the plaintiff.

L. Janin, for the appellant.

Martin, J., delivered the opinion of the court.

This is an hypothecary action, on a note of the defendant, given to the plaintiff's testator, for the price of a lot of ground.

The lot of ground was seized and sold, and adjudicated to one A. C. Tremoulet, who, in answer to a rule to show

cause why he should not comply with the terms and conditions of the sale, urged, that he has discovered since the adjudication, that the property sold was not that of the defendant, against whom the order of seizure and sale had issued, but that of G. T. Weisse, to whom the defendant had previously sold it.

The rule was made absolute, and Tremoulet appealed.

It does not appear to us that the judge *a quo* erred. Moreau, the mortgagor, bound himself not to alienate or mortgage the premises to the prejudice of his vendor and mortgagee. In the cases of *Nathan et al. vs. Lee*, 2 *Martin*, N. S. 32, and *Donaldson vs. Maurin*, 1 *Louisiana Reports*, 29, this court held, that the clause *de non alienando*, relieves the mortgage creditor, when he resorts to his hypothecary action, from the obligation or necessity of pursuing all the steps required by this action in ordinary cases, principally to make the vendee of the mortgagor, or person in possession, a party to the executory proceedings in the order of seizure and sale.

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GEORDANO
VS.
THOMAS ET AL.

Where the act of sale contains the clause *de non alienando*, the vendor is relieved from the necessity of making the third possessor a party to the executory proceedings in asserting his mortgage against the mortgaged premises.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court be affirmed, with costs.

GEORDANO vs. THOMAS ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS PRESIDING.

No appeal lies from an order of court dismissing a supplemental petition.

This is an action against the endorsers of a promissory note. The petition alleges that the note was protested at maturity, for non-payment, and due notice thereof given to the endorsers.

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*April, 1839.***CHANDLER ET AL.****VS.****BARKER.**

The defendant, Thomas, excepted to being sued separately from the drawer, as a hardship, and prayed to be dismissed.

He answered and averred, that the note sued on was given for part of the price of a lot of ground, and that he endorsed it as surety, and is entitled to the benefit of discussion, etc.

The plaintiff discontinued as to one of the endorsers, and had leave to file a supplemental petition as to another, and the defendant, Thomas, prayed for a jury.

The counsel for the defendants came into court, and had the order admitting the supplemental petition set aside, and the plaintiff appealed.

D. Seghers, for the plaintiff.

Grymes, *contra*.

Eustis, J., delivered the opinion of the court.

This is an appeal from an order of the court below, dismissing a supplemental petition filed by the plaintiff. We are of opinion that no appeal lies from a decree of this description.

The appeal is, therefore, dismissed with costs.

CHANDLER ET AL. VS. BARKER.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

A motion for a new trial, after the expiration of three days from the rendition of the judgment, is correctly overruled by the inferior court.

This is an action instituted by the plaintiff, for the use of D. B. Hempstead, on a judgment of the Supreme Court of the state of New-York, against the present defendant. Judg-

ment was rendered in the District Court for the sum of one thousand and ten dollars and twenty-six cents and costs, on the 16th April, 1838, but not signed until the 14th May following.

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On the 7th May, the defendant took a rule on the plaintiff to show cause why a new trial should not be granted. The rule was tried on the 12th May, and discharged on the ground that more than three days elapsed after the rendition of judgment, before the motion for a new trial.

The defendant appealed.

Hennen, for the plaintiff.

Barker, in *propria persona*.

Eustis, J., delivered the opinion of the court.

This is an action instituted against the defendant, on a judgment rendered against him in the Supreme Court of the State of New-York. There were various matters of defence set up in the court below, none of which appear to us to have been established. The case presents no question of law for our consideration, except that growing out of the application of the defendant for a new trial in the court below. The motion was made after the expiration of three days after the judgment was rendered. *Code of Practice, article 558*. The motion was correctly overruled.

The plaintiff is entitled to interest from judicial demand, but must pay the costs of appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, that the plaintiff have judgment against the defendant, for the sum of one thousand and ten dollars and seventy-six cents, with legal interest thereon from the judicial demand until final payment; the plaintiff and appellee paying the costs of appeal, and the defendant and appellant, paying those of the court below.

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MUNICIPALITY NO. TWO VS. CURELL ET AL.

MUNICIPALITY
NO. TWO
VS.
CURELL ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
DUCHANAN PRESIDING.

Where a contract of lease stipulates that the lessee shall pay all the state, parish and city taxes, and keep the *side walks* in repair, it cannot be construed to extend to the payment of the expenses of making the pavement in front of the leased premises.

When the city ordinances provides that the owners shall be taxed for the exclusive purpose of *paving the streets* and making the *side walks* in front of their property, the lessee cannot be required to pay this expense, unless he expressly binds himself to do so in his contract of lease.

This is an action by the Second Municipality, to recover the sum of one thousand five hundred and forty dollars and forty-five cents, for taxes due for paving certain property, owned and leased by the late Dr. Heermann to one Parks, for twenty years, and by him assigned to the defendants, R. and J. Curell, in 1827.

The facts of this case are fully stated by the district judge, in the following judgment :

"The question presented to the court in this case, is, whether the proprietors of certain property in the Second Municipality, or the lessee of said property, are bound to pay the expense of paving the street in front of the same ?

"The 2672d article of the Civil Code declares, that taxes and other dues imposed upon the property leased, shall be at the charge of the proprietor and not of the lessee, where there is no stipulation to the contrary. The obligation of the parties, however, are different in this particular instance. The following is a clause, in both leases under consideration : " (The lessee) will reimburse the lessor, his heirs, etc., on demand, at his proper cost and expense, and without deduction from the rents or otherwise, all the state, parish and city taxes, when due, which may be annually levied on said premises, and on all the buildings which shall be put and erected on the same, during said lease : and shall, also, at his proper cost and expense, preserve and keep in good repair, according to the municipal and other regula-

tions of the city, the side walks and banquets by which said property is bounded.’

“There is no doubt that the present charge is a tax, but it is not a tax annually levied. It is an extraordinary imposition, which does not enter into the sense of the clause just recited. That such was the understanding of the parties, is shown by the insertion of a separate agreement respecting the cost of side walks, and banquets or gutters. If the cost of making the side walks and gutters were included in the present demand, I would certainly condemn R. and J. Curell to pay that cost, but I perceive by the bills annexed to the petition, that such is not the fact. The bills appear to have been originally made out with two items, one for paving the street or carriage way, the other for making the side-walk and gutter. The second charge has been stricken out, and the first alone is left. I do not think the lessee has assumed the obligation of paying this charge, and without such stipulation in his contract, the law plainly charges the lessor.

“It is said that the Curells are to be considered as proprietors for twenty years : this cannot be conceded ; the contract has every feature of a lease, and is so styled in express terms. The lessee mortgages certain buildings, to be by him erected, it is true : upon those buildings the lessor would have had, by the nature of the contract, a lien of a higher nature than a mortgage. But I consider this stipulation of mortgage, as inserted through abundant precaution.

“It is, therefore, adjudged and decreed, that the Municipality No. Two, recover of the widow and heirs of Lewis Heermann, fifteen hundred and forty-four dollars and forty-five cents, and for interest at the rate of eight per centum per annum, from the 3d day of May, 1837, until paid, with costs of suit ; and that the defendants, R. and J. Curell, be discharged from this action, at costs of plaintiff. And it is further ordered, that the judgment against Heermann’s widow and heirs, be privileged upon the property described in the petition.”

From this judgment, Heermann’s widow and heirs appealed.

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L. C. Duncan and Caswell, for the appellants, contended that the claim of the Municipality was a tax, which by the terms of the lease, the lessees were bound to pay. *Oakey vs. Mayor et al.*, 1 *Louisiana Reports*, 1.

Haines, contra.

Rost, J., delivered the opinion of the court.

The original defendants in this suit are in possession of town lots situated in Municipality No. 2, under a twenty years lease, which contains the following clause: "The lessee will, also, at his proper cost and expense, and without deduction from the rents or otherwise, reimburse the lessor, on demand, and repay all the state, parish, and city taxes, which may annually be levied on said premises, and on all the buildings and improvements which shall be put and erected on the same during this lease, and shall at his proper cost and expense preserve and keep in good order and repair, according to the municipal and other ordinances, or police regulations of the city, the yard, wells and privies, as also the boundary walls, or fences, and the side-walks and gutters, by which the said property is bounded."

The council of the municipality caused the streets upon which these lots front, to be paved, and claimed from the said defendants one third of the cost of paving, in conformity with the ordinances in that case made and provided. The defendants denied their liability to pay, under the stipulations of the lease, and called the lessees in warranty. The lessees answered and alleged, that the expenses assessed by the plaintiffs, for the paving of streets, was a tax which the defendants were bound to pay, under their contract. The District Court dismissed the original defendants, and gave judgment in favor of the plaintiffs, against the lessees; considering themselves aggrieved by the judgment, they appealed.

Where a contract of lease stipulates that the lessee shall pay all the state, parish and city taxes, and keep the side walks in repair, it cannot be construed to extend to the payment of the expenses of making the pavement in front of the leased premises.

The amount of the plaintiffs' claim is admitted to be just, and the only question which this cause presents is, whether the clause of the lease which we have related, amounts, in

favor of the lessee, to an exception of the general law, which otherwise makes him liable in such cases.

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When the city ordinances provide, that the owners shall be taxed for the exclusive purpose of paving the streets and making the side walks in front of their property, the lessee cannot be required to pay this expense unless he expressly binds himself to do so in his contract of lease.

In 1827, five years before the date of the lease, the city council passed an ordinance, by which they imposed an annual tax, for twenty years, on all the owners of lots in the city and faubourgs of New-Orleans, for the exclusive purpose of paving the streets, and making side-walks in front of their property. By that ordinance, those before whose property the pavement was not made, were only required to pay after the execution of the work. This ordinance was in force in 1832, and we must presume that both parties to this lease were apprised of it. The lessee binds himself, at his cost and expense, to preserve and keep in good order and repair, according to the municipal and other ordinances, or police regulations of the city, the yard, wells and privies, as also the boundary walls and fences, and the *side-walks and gutters*, by which the property is bounded.

It appears to us, that where an ordinance existed, laying a tax for paving streets, and *making side-walks*, the mention of side-walks in the lease excludes the idea that the lessee would also be bound to pay for the paving of the streets. This charge was not considered by the parties to the contract as a tax annually levied, otherwise it would have been unnecessary to mention that the expense of making the side-walks should be paid by the lessee. Under the ordinance already referred to, it was only payable annually for twenty years, when the parties did not choose to pay in cash or to give notes with eight per cent. interest. The plaintiffs, by a subsequent ordinance, have repealed that part of the ordinance of 1827 which allows from one to twenty years, and now require the whole amount to be paid in ninety days after the work is done, or notes, endorsed, at six, twelve, eighteen, and twenty-four months, bearing eight per cent. interest.

We consider, that this charge was not viewed by the parties, at the time of the lease, as a tax which might annually be levied on the premises: that from its nature it could.

EASTERN DIST. not be so considered, and that it falls properly upon the
April, 1839. owner of the property.

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The point made by the appellants, that the lessee has a twenty years estate in the property, and must during that time be considered as the owner, cannot be sustained under our laws. The contract is a lease, and not a sale ; it would be void as a sale for want of a price. The length of time for which it is to last cannot affect the rights of the parties under it ; and it could be dissolved, as other contracts, for neglect of either party to fulfil his engagements. The judgment of the District Court must be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BLANCHET vs. MUNICIPALITY NO. TWO.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 WATTS PRESIDING.**

The commissioners appointed under the act of 1832, for opening and widening streets, are made the sole judges of the cases in which improvements are of so general a nature as to require payment of the expenses by the whole community, or only by the owners of property in the immediate vicinity, who are especially benefited by the improvement.

The courts are open to any abuses of the commissioners, but the party aggrieved must administer proof of the injury he complains of.

This case arose in the court below, on an opposition filed by the plaintiff, to the report of commissioners appointed and acting under the act of 1832, to widen and extend Notre Dame-street.

The facts and circumstances of this case are correctly detailed in the following opinion of the district judge :

"Commissioners having been appointed under the acts of 1832, page 132, for widening Notre Dame-street, between Magazine-street and Tchoupitoulas-street, and their report of assessment having been made, Jean Blanchet, a person affected by said assessment has filed an opposition to said report, under four heads, viz :

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"1. That the account of assessment of damages, viz : three thousand three hundred dollars for property of Blanchet, viz : eleven feet eight inches by one hundred and seventy, taken for this purpose, is too low.

"The witnesses establish, that up to the date of the assessment, no higher price than at that rate, had been given for property in that neighborhood on Magazine-street ; property is, or has been undergoing such a rapid advance, that it is difficult to look back and fix the mind's eye on former prices. According to the testimony adduced, the assessment for value of property taken, seems to be correct.

"2. The second head of opposition, is, that the assessment ought to have been extended beyond Tchoupitoulas-street, and be made to bear on all property on Notre Dame-street, as far as the Levee.

"This is a matter of opinion and discretion with the commissioners ; those who owned property on Notre Dame-street, beyond Tchoupitoulas-street, found a good opening on that street, they are benefited : but as the whole assessment is a light one, the commissioners might well think the amount which could be assessed on them, not to be worth the assessment and collection. In this, I think, there is no error : practical matters must not be refined on too much.

"3. The third head of opposition is, that opponent should not be made to contribute, as the portion of the lot left, is of less value than before the improvement was made.

"The witnesses are of a different opinion, and think that it would have been for the interest of the opponent to have gratuitously surrendered the portion of ground taken from him. I concur with the witnesses in this opinion ; at that place the street was only 26 feet wide for one hundred and seventy feet. If eight feet banquettes were taken off, the

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carriage way would be only ten feet wide, which is almost useless as a street; throwing in eleven feet eight inches, makes a carriage way of twenty-one feet eight inches, and gives a street of thirty-seven feet eight inches, a street as wide as Chartres-street, on which the opponent has, by this means, a front of one hundred and seventy feet. As opponent received the full value of the ground taken, his lot ought to bear an assessment for benefit conferred, and the amount does not appear to me too great.

"4. The fourth ground of opposition is, that the widening of the street is a general benefit to the whole municipality to which its funds ought to have contributed, under the section of the act referred to. Every local benefit is a general benefit, for the Municipality is made up of various localities, but it is believed, that the general benefit contemplated by that section of the act, must be of a more definite, distinct and universal nature, than the one claimed to be assessed on the Municipality, by making the contemplated improvement. It is not sufficiently and generally useful or important to make it the subject of a tax on the Municipality, and the commissioners have done right in not so considering it.

"None of the grounds of opposition appearing to me to be sustained, it is considered that the opposition be overruled, and that the opposing party pay the costs of said opposition."

The plaintiff appealed.

Morphy, for the appellant.

Carter, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment setting aside his opposition to the report of the commissioners appointed under the act of 1832, for widening Notre Dame-street, on the following grounds:

1. That the damages allowed him are too small.
2. That the assessment ought to have been extended to property on Notre Dame-street, from Tchoupitoulas-street to the Levee.

3. That no contribution ought to be charged to him, because the portion of his property left is diminished in value by the improvement. EASTERN DIST.
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4. That the widening of the street is a general benefit to the whole municipality, to which its funds ought to have contributed, under the section 8th of the above act.

The counsel of the appellants has confined his opposition in this court to the fourth ground. The section there referred to provides, "That if the commissioners shall deem the improvements so to be made, not only a local improvement, but also tending to the salubrity, beauty, benefit, or improvement of the whole city; it shall be the duty of said commissioners to assess any part of the assessment for said improvement, to the said mayor and city council, as they shall deem just and equitable."

Our learned brother of the District Court has been of opinion, that although every local benefit is a general one, for the municipality is made up of various localities, still the general benefit contemplated by the 8th section must be of a more definite, distinct, and universal nature than the one claimed to be assessed on the municipality, by making the contemplated improvement. It is not sufficiently and generally useful or important, to make it the subject of a tax on the municipality, and the commissioners have done right in not so considering it.

The legislature has thought fit to constitute the commissioners the sole judges of the cases in which the improvements are of so general a nature as to demand that the charges attending them should not be borne by the inhabitants in the vicinity of which they are made alone, but by the whole community, and be paid in whole or in part out of the coffers of the municipality. It is true the courts are open to those who may deem themselves aggrieved by the abuse of the powers of the commissioners; but suitors in such cases should not confine themselves to complaints, but administer proof of their having been really aggrieved. This does not appear to have been attempted in this case. Clamors have been heard, but no satisfactory evidence has been laid before

The commissioners appointed under the act of 1832, for opening and widening streets, are made the sole judges of the cases in which improvements are of so general a nature, as to require payment of the expenses by the whole community or only by the owners of property in the immediate vicinity, who are especially benefited by the improvement.

The courts are open to any abuses of the commissioners, but the party aggrieved must administer proof of the injury he complains of.

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EASTERN DIST. the first judge, and we have seen nothing that can justify
April, 1839. our interference.

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It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

MAYOR ET AL. vs. HOPKINS ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.

The sale of a part of the open space or *quai*, in front of Old Levee-street, in New-Orleans, was sold as *public* property, and has been lawfully alienated by the sovereign authority; for the disposition of the proceeds of the sale, in being made part of the sinking fund of the city, by an act of the legislature, is equivalent to an original authority on the part of the state to make the alienation.

The public space or *quai*, in front of Old Levee-street, and between it and the river, in the city of New-Orleans, is, by the plan of the city, appropriated to the use of the public, and having been ever occupied as such, is a *public place, hors de commerce*, and cannot be claimed by an individual in a civil action.

The destination of this space as a *public place*, was made by the sovereign power, and the right to alienate or to make a change in it, whenever the public interest requires it to be done, is vested in the sovereign power, and to this the rights of front proprietors are subordinate.

This is an action against the maker and endorser of two promissory notes, given as part of the price of a lot of ground, comprised in the vacant space or square between Custom-house and Bienville streets, and in front of Old Levee-street, in the city of New-Orleans. When these notes became due, they were protested for non-payment, and the present plain-

tiffs, the Mayor, Aldermen and inhabitants of the city of New-Orleans, instituted suit to recover the amount thereof, for the benefit of the sinking fund, in pursuance of an act of the legislature, passed the 8th March, 1836, dividing the city into three municipalities.

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The defendants admitted their signatures, and pleaded various matters in defence; but Hopkins, the maker of the notes, averred that he was already the owner of a lot on Old Levee-street, fronting the river *Mississippi*, according to the original titles, and that all the space in front of his lot, (and which has been sold,) was designated on the original plan of the city as public property, and marked as a *quai*; in consideration of which, he avers, he is entitled to enjoy all the rights, advantages and privileges of such a situation.

He alleges that the sale of this front space in lots, is illegal; that by it he has been deprived of the privilege of a front proprietor, and that it belonged to the public as a *quai*, so long as the city should claim it for this purpose. He further avers, that the corporation had no right to consent to the sale of said space of land; that it had no title, other than the right to keep the same open as a *quai*, and to regulate the use of it for the benefit of the public. He prays that said notes be cancelled, and that they, together with others he gave, be returned to him, and that he have judgment for damages occasioned him, in being deprived and cut off from his privileges as a front proprietor. Upon this issue the case was tried by the court.

The evidence shows that the space of ground, lying between Old Levee-street and the public road or street, running along the Levee, at the upper and lower extremities of the city proper, and which was originally designated on the plan as a *quai*, had become enlarged by alluvion, or batture, in front, and it was deemed necessary to sell off a portion of it into lots. At this time, (1834,) the space in question was in contestation between the United States and the Corporation of New-Orleans. While suit was still pending, and before the decision of the Supreme Court of the United States, giving this property to the Corporation, an agreement

EASTERN DIST. was entered into between the parties litigant, that the ground
April, 1839. in contest be laid out into lots, and sold at public auction, and
MAYOR ET AL. the proceeds of sale held subject to the final judgment of the
vs. court.
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Judgment was rendered in the Supreme Court of the United States, at the January term, 1836, in favor of the Corporation of New-Orleans. On the 11th of March, 1836, the legislature passed a law sanctioning this sale, and providing that the net proceeds *be, and form a part of the sinking fund* of the Corporation, according to the provisions of the 15th section of the act, approved the 8th March, 1836, dividing the city into municipalities.

On the whole evidence adduced, the district judge gave judgment for the plaintiffs, and the defendants appealed.

Canon, for the plaintiffs, urged the affirmance of the judgment. The defendants had no ground of defence, as there was no eviction or disturbance in regard to the possession or title to the property.

2. The appellants cannot set up any want of authority to sell the premises, as they have taken possession and improved the property, and have, by their acts, ratified all the proceedings in relation to the sale.

Preston, for the appellants.

Eustis, J., delivered the opinion of the court.

This is an action against the drawer and endorsers of two promissory notes. The answer alleges, that the defendant, James Hopkins, is the owner of a certain lot of ground in the city of New-Orleans, situated on Levee-street, between Bien-ville and Custom-house streets, that he holds, and his vendors have always held said property, under titles describing it as fronting on the river Mississippi, that the space between his lot and the river was designated on the original plan of the city, and on all plans subsequently made, as public property, in consequence of which he, Hopkins, was a front proprietor, and entitled to have and enjoy all the rights, privileges, and advantages of such a situation; that under a decree of the

District Court of the United States for the Eastern District of Louisiana, rendered by consent of parties in the suit of the United States against the mayor, aldermen, and inhabitants of the city of New-Orleans, the space of ground between Levee-street and the river, between the lateral streets last mentioned, including the space in front of his, the respondent's, lot, was advertised for sale at public auction ; that said decree was made without any lawful authority, and all the proceedings under it were null and void ; that the respondent entered his protest against the sale, and notwithstanding his opposition and protest, the sale took place, and to prevent third persons from purchasing the space, he purchased the lot immediately in front of his property as before described ; that the two notes sued on were given by the respondent in part payment of the lots thus purchased by him. He pleads that the plaintiffs cannot maintain this action, because the court issuing the decree under which the property was sold was without jurisdiction, and that as the plaintiffs had no right, title, or interest in the property sold, the consideration on which the notes were given has totally failed ; he prays that the notes sued on be cancelled by the order of the court, and that the other notes given by him in payment of said lot be delivered up to him. He also alleges, that by the said illegal conduct of the plaintiffs, in causing said public property to be sold, he has sustained damages to the amount of twenty thousand dollars, which he pleads in reconvention, and concludes with a prayer for general relief.

There was judgment for the plaintiffs, and the defendant has appealed.

The suit in which the property in front of the city was in litigation, was finally determined in the Supreme Court of the United States, in January term, 1836, and is reported in 10th Peters's Reports, 733.

By a law of this state, passed on the 11th of March, 1836, the funds arising from this sale, in the event of a decision in favor of the present plaintiffs, against the United States, were made a part of the city sinking fund, established by the 15th

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section of the act dividing the city into three municipalities, passed on the 8th March, 1836.

The judge of the court below, in overruling the evidence offered by the defendants on the trial of the cause, decided on the principle, that as it appeared by the answer of the defendant, Hopkins, that he had not purchased the lot fronting his property in error or under a mistake of his rights, he was estopped from contesting the title under which he purchased, and to which he had given his consent in an authentic act.

We doubt very much whether the doctrine of estoppel will apply in a contract of sale, between the vendor and vendee. This is a doctrine of legal policy only. Its application must necessarily depend on the circumstances of each case. 7 *Wheaton's Reports*, 535, 547. As we decide this case on other principles, there is no necessity for considering the propriety of its application in the present instance.

Taking the case of the defendant as he has stated it himself, how stands his defence to this action?

His lot is on Levee-street; it is held under titles describing it as fronting on the river Mississippi; the space between his lot and the river was designated in the original plan of the city, and all subsequent plans, as *public property*; he was a front proprietor, and entitled to all the rights, privileges and advantages of such a situation.

The sale of a part of the open space or *quai* in front of Old Levee-street, in New-Orleans, was sold as *public* property and has been lawfully alienated by the sovereign authority; for the disposition of the proceeds of the sale in being made part of the sinking fund of the city, by an act of the legislature, is equivalent to an original authority on the part of the state to make the alienation.

How can he complain of the alienation of this space. If, as he says, it was *public property*, it has been lawfully alienated by the sovereign authority; for the disposition of the proceeds of the sale by an act of the legislature, is equivalent to an original authority on the part of the state to make the alienation. If this space could be sold lawfully whenever the sovereign power should determine that its destination should be changed, what possible right can the front proprietors have to any indemnity from the state or those who stand in its stead. The change in this space, whenever the public interests should require it, is necessarily a condition resulting from the original destination; and the rights and advantages of situation of the front proprietors, were neces-

sarily dependent on and subordinate to this condition. This they knew or were bound to know, when they acquired the property to which this supposed right or privilege of situation is attached. The right of the sovereign power to change the destination of this space of ground is as complete as the right of the defendant to enjoy his privileges in relation to it, until such change takes place.

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The true character of this space of ground under consideration, we think has been conclusively settled in the dissenting opinion delivered by the present presiding judge of this court, in the case of Cucullu and De Armas, against the present plaintiffs, reported in 5 Louisiana Reports, 174, which was adopted as the basis of the judgment of the Supreme Court of the United States, in the suit in which the sale was made of which the defendant complains.

Judge Martin says, in his opinion, "I conclude, therefore, that the space under consideration, appearing by the plan of the city of New-Orleans to have been appropriated to the use of the public, and having been ever occupied as such, (although, in two instances, governors favored individuals with grants of part of it,) this court ought to say the *locus in quo* is part of a *public place, hors de commerce*, and cannot be claimed by an individual in a civil action." On the subject of changing the destination of public places, the opinion of the court was unanimous.

The public space or *quai* in front of Old Levee street, and between it and the river, in the city of New-Orleans, is by the plan of the city appropriated to the use of the public, and having been ever occupied as such, is a public place *hors de commerce*, and cannot be claimed by an individual in a civil action.

The destination of this space as a *public place*, was made by the sovereign power when Louisiana was under the dominion of the French monarchy; it was changed by the sovereign authority of the state of Louisiana. The right to make this change, whenever the interests of the public required it, is vested in the sovereign power; to this right, that of the front proprietors is necessarily subordinate.

The destination of this space as a public place, was made by the sovereign power, and the right to alienate or to make a change in it, whenever the public interest requires it to be done, is vested in the sovereign power, and to this the rights of front proprietors are subordinate.

We consider that none of the rights or privileges of the defendant have been violated by the sale of the space in front of his estate, and that there is no ground in law or equity for his withholding the price of it, and that he has no claim for damages against the plaintiffs for their acts complained of.

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vs.
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We have not noticed in detail the several bills of exception taken by the counsel of the defendant to the opinion of the judge refusing to admit the evidence offered. If the evidence went to prove any other matters than those admissible in evidence under the allegations of his petition, it was properly rejected; and if all his allegations were established, there would, under the view we have taken of the case, be no defence to the action of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.



MAYOR ET AL. vs. LEVERICH ET AL.—Two cases.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.**

Front proprietors of lots cannot prevent the sovereign authority of the state from alienating the vacant space in their front, designated as a public place, or *quat*, when the public interest requires it; their rights are subordinate.

These cases depend on the same facts, and are decided on the same principles, involved in the case of the *Mayor et al. vs. Hopkins et al.*, ante 326.

The defendants are appellants from two judgments, depriving them of their defence as front proprietors, and requiring them to pay certain notes.

Canon, for plaintiffs.

Preston, for the appellants.

Eustis, J.—In these cases, the defendants, W. E. & J. H. Leverich, are the purchasers, and Hopkins is the endorser of the notes; with this exception, the facts in these cases are the same as those in which an opinion has been given.

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The judgments of the District Court, are, therefore, affirmed, with costs in both courts.

MAYOR ET AL. vs. HOPKINS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The sovereign authority in a state, can authorize the alienation of a *public place* destined for public use, when from the nature of its destination the public interest requires it.

This case is decided on the same facts and principles, involved in the case of the *Mayor et al. vs. Hopkins et al.*, ante 326.

Canon, for plaintiffs.

Preston, for the appellants and defendants.

Eustis, J.—The facts of this case being the same as those in which an opinion has been just given, the judgment of the court below is affirmed, with costs in both courts.

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BLANC *vs.* DUPLESSIS, F. M. C.

BLANC
vs.
 DUPLESSIS, F. M. C.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
 PRESIDING.

Parole evidence is ~~ad~~missible to prove a boundary line recognized by the parties, in support of a plea of prescription; with this limitation, it goes merely to prove a fact connected with the actual possession of the party.

Where the grantee of a tract of land supposed to contain seventeen arpents, fronting on the Mississippi, sells the lower twelve arpents to two purchasers, (six arpents each,) *with certain fixed boundaries*, these will control the quantity in case of deficiency in the whole tract.

So, where a party proves actual possession to certain and fixed boundaries, by making roads, levees, and the front fences, he will hold by prescription, to the extent of his boundary, against an older title.

When two possessions lap, that which is most perfect, and best characterizes the right of property, is to be preferred; that which is corporeal, and manifested by acts peaceable and notorious, will prevail over that which is merely intentional.

This is a petitory action, in which the plaintiff alleges that the defendant, who is an adjoining proprietor, has encroached on his land, and taken two arpents more than he is entitled to, according to their respective titles. He prays that this land be decreed to belong to him, and that the boundary between him and the defendant, be fixed and established, etc.

The nature of the titles under which the parties claim, and all the material facts of the case, are fully stated in the opinion of the court.

The defendant pleaded possession, and the prescription of ten years, under a just title, in good faith, etc., and set out his titles.

On the trial of the case, the defendant offered to prove by parole testimony, that Charles and Cyprien Duplessis, (the latter is the defendant,) had fixed on a certain oak tree as a boundary between their respective lands, and for this purpose introduced witnesses to state what Cyprien Duplessis had told them in relation to the subject: also, what they had

heard from other persons. To which testimony the plaintiff objected on the grounds: *First*, That the fixing of boundaries cannot be proved by parole testimony. *Second*, The testimony is inadmissible, being only hearsay of what the defendant himself and other persons had stated, on the subject of boundary between the land of plaintiff and defendant.

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The court admitted this evidence in a qualified manner. It stated that the declarations of the defendant were not considered in evidence, but that boundaries can only be fixed under the Code, by pursuing the forms prescribed; and a party pleading prescription, may prove by parole, a boundary line recognized by the parties, of lands within that boundary. The plaintiff took his bill of exceptions.

The district judge gave judgment adversely to the plaintiff's pretensions, but fixed the boundaries heretofore recognized by the parties, and the plaintiff appealed.

Roselius, for plaintiff. Both parties claim the land in controversy, under titles derived from the same person; as the appellants title is of an anterior date to that of the appellee, the former must take the whole extent of land conveyed to him, and the latter can only claim the residue.

2. The judge, *a quo*, erred in deciding that the appellee had acquired the quantity of land which he claims by prescription. The action of partition cannot be prescribed against; *Louisiana Code*, articles 1227, 1228. No separate and actual possession is shown in the appellee, to support the plea of prescription.

Preston, contra.

Rost, J., delivered the opinion of the court.

On the 11th January, 1810, the grantee of a tract of land supposed to contain seventeen arpents front, on the Mississippi river, sold the lower twelve arpents, to Sylvain and Charles Duplessis, in the manner stated in the following stipulation:

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"Le sieur Martin Duplessis déclare que les six arpens à partir de la borne d'un haut, en descendant, appartiennent et ont été vendus à Charles Duplessis m. l., un des acquereurs : et les six arpens à partir de la borne d'endas en montant, appartiennent et ont été vendus à Sylvain Duplessis, m. l., autre acquereur, ce qui a été accepté par les deux acquereurs qui ont dû être satisfaits."

On the 16th of September, 1820, Cyprien Duplessis, the defendant, acquired the remaining five arpents. On the 20th of August, 1828, Charles Duplessis sold his land to John Austin, and the said land having been seized under execution as the property of the said Austin, on the 23d September, 1829, the plaintiff acquired, at sheriff's sale, five arpents thereof, and the defendant purchased, at the same time, the remaining arpent.

The whole front of the original tract is only fourteen arpents, twenty-seven toises and three feet, instead of seventeen arpents, and the plaintiff alleges, that himself and Sylvain Duplessis being the first purchasers, are entitled to take the full quantity called for by their titles, and that the deficiency must fall on the portion held by the defendant.

The defendant answers, that he is the just owner and possessor of six arpents front, of land acquired by him as above stated, and that he, and those under whom he claims, have been in open, peaceable, and uninterrupted possession of said land, in presence of the plaintiff, and those under whom he claims, for more than ten years before the institution of this suit, and that if his title had ever been defective, which he denies, the defect is cured by prescription. He further contends, that if there be any deficiency it must be borne by the plaintiff, and that he is entitled to one sixth of the land sold at sheriff's sale, which he prays may be adjudged to him. There was judgment in his favor in the District Court, and the plaintiff appealed.

Parole evidence is admissible to prove a boundary line, recognized by the parties in support of a plea of prescription; with this limitation it goes merely to prove a fact connected with the actual possession of the parties.

Our attention is first directed to a bill of exceptions taken by the plaintiff's counsel to the opinion of the court, stated to have admitted parole evidence to prove an agreement between Cyprien and Charles Duplessis, establishing a boundary between them. The court stated that the evi-

dence was only admitted to prove a boundary line, recognized by the parties, in support of the plea of prescription; with that limitation, the testimony was clearly admissible, it went merely to prove a fact connected with the actual possession of the parties.

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We are satisfied by the wording of the sale from Martin Duplessis to Charles and Sylvain, that the land was sold under fixed boundaries; the lower boundary being that of the grant, and the upper, that from which Charles Duplessis was first to take his quantity. The words, *Les six arpens à partie du la borne d'en haut en descendant*, will admit no other interpretation, but that an upper boundary existed at the time, to the knowledge of the parties, and that the sale was made in reference to it. The parole evidence adduced by the defendant, as well as the understanding of the parties, as shown by their acts since the date of their purchase, satisfies us that the live oak mentioned by the witnesses, was the boundary between them. If then the land conveyed to Charles and Sylvain Duplessis, was sold with fixed boundaries, those boundaries control the quantity, and Charles Duplessis and his successors, never had any right to the land claimed by the plaintiff. Had no upper boundary been fixed by the sale, the defendant has made out a clear case of prescription to all the land he has possessed under the sale made to him in 1820, to the full extent of five arpens. The witnesses state that since he purchased, he always maintained the roads, levees, bridges and front fences, down to the live oak, and that his vendor did the same before him. Those witnesses who have lived with and worked for the defendant, state that the defendant always worked down up to that boundary, and that there was no doubt between him and Charles Duplessis, or amongst the neighbors, about the extent of their respective possessions. No evidence can be clearer or more satisfactory. Under these circumstances, the possession of the plaintiff, if it existed at all under his title, was merely intentional, and cannot avail him against that of the defendant. When two possessions lap, that which is most perfect and best characterizes the right of

Where the grantee of a tract of land supposed to contain seven-teen arpents, fronting on the Mississippi, sells the lower twelve arpents to two purchasers, (six arpents each,) with certain fixed boundaries, these will control the quantity in case of deficiency in the whole tract.

So, where a party proves actual possession, to certain and fixed boundaries, by making levees and front fences, he will hold by prescription, to the extent of his boundary against another title.

When two possessions lap, that which is most perfect and best characteri-

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VS.
BARRETT.

zes the right of
property, is to
be preferred;
that which is cor-
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nifested by acts
peaceable and
notorious, will
prevail over that
which is merely
intentional.

property, is to be preferred; that which is corporeal and manifested by acts peaceable and notorious, will prevail over that which is merely intentional; the presumption being, that the will to possess ceases when it remains inactive and suffers an actual adverse possession. *Trop long verbo Prescription, No. 245.*

We are of opinion, that the plaintiff ought to take nothing by his action, and that under the 846th article of the Louisiana Code, the defendant is entitled to one-sixth of the land sold at sheriffs' sale.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HAMPTON ET AL. VS. BARRETT.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

Where the purchaser stipulated to pay interest annually, on the price of a plantation, and there is no evidence to justify him in withholding payment, he can only be relieved by demanding the *deposit of the price*.

This is an action for two years arrear of interest, due by the defendant on the *price* of a sugar plantation. See the case in 9 *Louisiana Reports*, 336.

On the return of the cause to the District Court, the defendant filed his answer, averring, that this case cannot be tried until the final determination of a suit in the United States District Court, between the same parties, for the two previous instalments of interest due on the same debt; that in that defence he has pleaded want of title in the vendor, disturbance by suits and danger of eviction, prayed for a rescission of the sale, &c. Some other matters were set up

in defence, but there was no testimony produced on the trial on the part of the defendant.

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The district judge gave judgment for the plaintiffs for the several sums claimed by them, with legal interest thereon, and the defendant appealed.

GOODRICH ET AL.
vs.
SOUTHMAYD.

Preston, for the plaintiffs.

L. Peirce, contra.

Eustis, J., delivered the opinion of the court.

This is an action for arrears of interest, due on the price of a plantation, sold by the plaintiff's ancestor. The interest was payable annually throughout the term, on every first day of January. There is no evidence before us which would justify the defendant in withholding the payment of the interest. If he wished to have been relieved from the payment, he ought to have demanded the deposit of the price, according to the provisions in article 2537 of the Louisiana Code.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.



GOODRICH ET AL. vs. SOUTHMAYD.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

Creditors holding certain notes in pledge, which they cause to be prematurely seized by the sheriff, on their judgment and execution, do not thereby divest themselves of the possession of the pledge; although illegally seized, they are still in the possession of the sheriff as an officer of court, subject to the right of the pledgees.

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VS.

SOUTHMAYD.

This case comes up on an appeal from a judgment discharging a rule, which the plaintiffs took on Brown, Brothers & Co. and their counsel in this city, to show cause why certain promissory notes, owned by the defendant, Southmayd, and pledged by his house in New-York, to Messrs. Brown, Brothers & Co., should not be sold to satisfy the judgment of the plaintiffs.

The pledgees were creditors of Southmayd, and had obtained judgment in April, 1838, with stay of execution for six months. Before the end of this term they took out execution, and had the notes seized in the hands of their counsel, by the sheriff, and which were afterwards sold.

On the 20th of November, the plaintiffs took their rule to have these notes sold, for the benefit of their judgment. The rule was discharged, and they appealed.

It was admitted the notes were pledged in New-York, and sent out here; and that by the laws of that state, a pledge of promissory notes is not required to be made by notarial act.

Caswell, for the plaintiffs and appellants.

L. Peirce, contra.

Eustis, J., delivered the opinion of the court.

Brown, Brothers & Co. of New-York, sued the defendant under the name of F. R. Southmayd & Co., in the court of the first district, for the balance of an account; they allege, that they had received certain promissory notes from the defendant, which were annexed to the petition, to be returned to the defendant whenever the amount of their account should be paid.

On the 23d April, 1838, by consent of parties, judgment was entered for the plaintiff with a stay of execution for six months.

A writ of *feri facias* was issued on this judgment and returned, without being executed before the expiration of the term.

An *alias fieri facias* was issued on the 28th of August afterwards; and under this writ, the notes before mentioned, were seized, and on the 26th of November were sold by the sheriff, for fifteen hundred and sixty dollars, a sum not equal to one-half the amount of the 'plaintiffs' judgment.

The plaintiffs in this suit had a judgment against the defendant, which was rendered on the 1st of October, 1838, and before the expiration of the term for which the execution on Brown, Brothers & Co.'s judgment had been stayed, issued a writ of *fieri facias* on their judgment, and took a rule on the sheriff, to show cause why the notes in question, which had been advertised for sale, in the case of Brown, Brothers & Co. and the defendant, should not be sold to satisfy the judgment of the plaintiffs, having been legally seized in their suit against the defendant, and in none other.

It appears that the notes had been pledged to Messrs. Brown, Brothers & Co. by the house of Southmayd, in New-York, with the consent of Southmayd, the defendant. The law of New-York is admitted. It appears that the defendant gave no consent to the issuing of the execution on the judgment of Brown, Brothers & Co.

The question, as the case has been submitted to us, rests entirely on the correctness of the decision of the judge, in discharging this rule, from which the plaintiffs have appealed.

Assuming that these notes were pledged to Brown, Brothers & Co., in whose possession they were at the inception of their suit, we do not consider that the fact of their being put into the hands of the sheriff, under these circumstances, changes in any respect their rights on them. They were tendered to the defendant in their suit, on the payment of the debt due to them, and admitting what the plaintiffs counsel has urged upon us, that they were illegally seized on the execution before the term had expired, they are still in the possession of the sheriff as an officer of the court, to carry into effect the tender made in the petition of Brown, Brothers & Co., and necessarily subject to their rights on them, or as their agent. We do not consider, that as creditors, they have divested themselves of the possession of the

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GOODRICH ET AL.
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Creditors holding certain notes in pledge, which they cause to be prematurely seized by the sheriff on their judgment and execution, do not thereby divest themselves of the possession of the pledge; although illegally seized, they are still in the possession of the sheriff, as an officer of court, subject to the right of the pledgees.

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VS.
ATCHAFALAYA
BANK.**

pledge. This being the case, we cannot inquire into the validity of the contract of pledge, under which they held the notes, on the rule under consideration, there being no allegation under which its validity can be tested. The proper mode of proceeding in cases of this kind, is pointed out in articles 1965 and *seq.* of the Louisiana Code.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MACCOUN VS. ATCHAFALAYA BANK.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.**

The certificate of protest of the notary, is required to make mention of the *demand* and of the *manner and circumstances of making it*, and is evidence of the matters it contains; but *is not evidence* of the acknowledgment of the party to pay the debt in a particular description of notes.

This is an action by the holder of a draft, drawn by the chief engineer, on the Atchafalaya Rail Road and Banking Company, for the sum of five hundred dollars, payable at sight.

The defendants pleaded a general denial.

On the trial, the plaintiff offered in evidence the certificate of protest of the notary, which states that he, (the notary,) presented the draft sued on, to the cashier of the bank, and demanded payment thereof in specie, and was answered "that he could pay the same in current bank notes of this city, but could not pay the same in specie, as the bank had suspended specie payment."

This was the principal evidence offered, in addition to the draft, the signatures, etc., to which were admitted. The

question turns mainly on the sufficiency of the evidence in the notary's protest, to prove the acknowledgment of the cashier of the bank to pay the debt in bank notes.

The district judge was of opinion, it was proof of an acknowledgment to pay, and gave judgment for the plaintiff. The defendants appealed.

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VS.
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BANK.

Lockett and Micou, for the plaintiff.

Hoffman, for the defendants.

Rost, J., delivered the opinion of the court.

This is an action instituted upon a check drawn in favor of the plaintiff upon the defendants, by the chief engineer of the Atchafalaya Rail Road and Banking Company. The defendants answered, and denied all the allegations by which they could be held responsible for the payment of the plaintiff's claim. Judgment was given in favor of the plaintiff, and the defendants appealed.

The only evidence of an offer on the part of the defendants to pay, is the declaration of the notary in the act of protest, that when he demanded payment in specie from the cashier, the latter expressed his willingness to pay in current bank notes of the city of New-Orleans, but could not pay the same in specie, as the bank had suspended specie payment. The counsel for the defendants, contends that this is not evidence, and that the act of protest proves nothing more than *rem ipsam*. The act concerning protests, approved the 13th March, 1827, provides that notaries are authorized in their protests to make mention of the demand, and of the manner and circumstances of such demand; and whenever they shall have so done, the certified copy of such protest, shall be evidence of all the matters therein stated.

The answer of the cashier in this instance, cannot properly be considered as a circumstance of the demand, and should have been proved on the trial, like any other fact, by the notary or other competent evidence.

The claim of the plaintiff is not legally proved, but as we

The certificate of protest of the notary is required to make mention of the demand and of the manner and circumstances of making it, and is evidence of the matters it contains; but it is not evidence of the acknowledgment of the party to pay the debt in a particular description of notes.

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have no reason to believe that it is not justly due, we are of opinion that the case ought to be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and the case remanded for a new trial, with directions to the district judge, to proceed therein according to law, and in conformity with the opinion of this court. The plaintiff and appellee paying the costs of this appeal.

MUNICIPALITY NO. ONE vs. BARNETT.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

The property owned by the corporation of New-Orleans at the time of its division into municipalities, belongs to the municipality in which it is situated; but the proceeds of all sales, claims for money, *rights and credits due to it* at that time, can only be claimed and sued for by the mayor and commissioners of the sinking fund.

So, where certain lots situated in the First Municipality were sold by the corporation to the defendant, before the division of the city, but the terms of sale not being fully complied with, or payment made, this municipality cannot maintain an action for the rescission of the sale and get back the lots. This right can only be exercised by the mayor and commissioners.

An act for the retrocession of certain property, signed only by the purchaser, is not binding, and has no force on the seller, until accepted by him in some legal manner.

If the date of a purchaser's signature to an act of retrocession be proved, it is a mere pollicitation, until signed or accepted by the other party, and ceases to have any effect the moment his capacity to accept is taken away.

This is an action instituted by the First Municipality, in 1837, for the rescission of the sale of certain lots within its limits, made by the corporation of New-Orleans, in 1833, at public auction, and which were adjudicated to the defendant.

The plaintiffs allege, that the defendant failed to comply with the terms of sale, by making payments and giving his notes as required, and that he still refuses to comply after being put *in mora*, by the mayor, in neglecting and refusing to sign the act of sale. They pray that said adjudication be declared null and void, and that they recover back said lots, together with damages.

The defendant pleaded a general denial, and averred that the adjudication gave to him a good and valid title, and that he had always been ready and willing to comply with the terms of sale, but that the plaintiffs, on their part, failed and refused to execute an act of sale, although often requested. He prays that his title to said lots be declared good, and that this suit be dismissed.

On this issue, the case was tried before the court.

The evidence showed that the sale was made by the corporation the 20th December, 1833, and that the defendant called repeatedly on the notary of the plaintiffs, and offered to comply with the terms of sale. Some difficulty was made in relation to the sale, and an ordinance was passed authorizing the mayor to receive a retrocession of the property sold at said sale, from such persons as had failed to comply with the terms thereof; and by another ordinance, passed soon afterwards, the property of all persons who failed to comply, or delayed to relinquish or retrocede, should be re-sold at their risk. The defendant offered to relinquish his purchase, and in December, 1835, signed an act prepared in the office of the corporation notary, to that effect, but which was never signed by the mayor, notary or witnesses.

In this manner things stood at the passage of the act, in March, 1836, dividing the city of New-Orleans into three municipalities. This act provides, that all the city property at the time of the division, shall belong to the municipality in which it was situated; but that all the proceeds of sale,

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money demands, rights and credits, should go into the general sinking fund, and be under the control of the mayor and commissioners of the sinking fund.

In January, 1837, this suit was instituted by the First Municipality, in which these lots are situated, to recover back the property.

Judgment was rendered in favor of the defendant, and the plaintiffs appealed.

Mercier and Denis, for the plaintiffs.

Schmidt, contra.

Rost, J., delivered the opinion of the court.

In January, 1837, the plaintiffs instituted this action to rescind a public sale of town lots, made to the defendant, by the mayor, aldermen, and inhabitants of the city of New-Orleans, on the ground that he had failed to comply with the terms and conditions of the adjudication, and that he had not signed the act of sale.

The defendant denied all the allegations of the plaintiffs, which could entitle them in any manner to rescind the sale, and averred that he had always been ready to do all which in law he was bound to do, but that the plaintiffs were in fault. He prayed to be quieted in his possession and title, and for general relief. Judgment was given in his favor, and the plaintiffs appealed.

Before the plaintiffs can maintain this action, it is incumbent upon them to show that they are subrogated to the rights of the original vendors. This is a link in their chain of title, without which they cannot proceed, and the defendant has the right to avail himself of the want of it, under his pleadings. In 1836, the corporation, of the mayor, aldermen, and inhabitants of the city of New-Orleans, ceased to exist (except for the purposes of liquidation,) and the municipal government of the city was vested in three distinct municipalities, of which the plaintiffs are one. The 15th section of the act creating this new form of government, provides that

each municipality shall be the owner of the property of the old corporation situated within its limits; and that all claims for money, rights and credits, due to the said corporation, shall remain in common, and when collected, be applied to the payment of its debts, under the superintendence and control of the mayor and the commissioners of the sinking fund created by that act. It is, therefore, necessary to ascertain whether, at the time of the promulgation of this act of the legislature, the sale to the defendant continued in force; if before that time the defendant had made a valid retrocession of the lots, they would belong to the plaintiffs, as all other town property situated within their limits, and an action could be maintained for the property and the possession of them: but, if the effects of the adjudication continued till that time, the old corporation had nothing against the defendant, except a claim for the purchase money, which, according to the provisions of the aforesaid act, was for a particular purpose, together with all the rights of action incident thereto, vested in the mayor and the commissioners of the sinking fund. If, in the last alternative, after the new law went into operation, the defendant failed to pay, or to comply with any conditions of the contract, that contract might be rescinded, but the right of action would belong exclusively to the mayor and commissioners. The party who has power to remit the price, can alone maintain an action for the rescission of the sale.

The plaintiffs have shown a resolution of the old city council, passed on the 30th October, 1835, authorizing the mayor to accept from the defendant, and other purchasers of town property, who had not complied with the conditions of the sale, a retrocession and relinquishment of all the right, title and privilege, which they had acquired to the said property by the sale and adjudication. They have also given in evidence, a paper dated in December, 1835, signed by the defendant, and purporting to be a notarial act between him and the mayor, containing a retrocession and relinquishment, in conformity with the aforesaid ordinance; that paper is not signed by the mayor and the notary, and is not attested by witnesses.

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The property owned by the corporation of New-Orleans, at the time of its division into municipalities, belongs to the municipality in which it is situated; but the proceeds of all sales, claims for money, rights and credits due to it at that time, can only be claimed and sued for by the mayor and commissioners of the sinking fund.

So, where certain lots situated in the First Municipality, were sold by the corporation to the defendant, before the division of the city, but the terms of sale not being fully complied with, or payment made, this municipality cannot maintain an action for the rescission of the sale, and get back the lots. This right can only be exercised by the mayor and commissioners.

An act for the retrocession of certain property, signed only by the purchaser, is not binding, and has no force on the seller, until accepted by him in some legal manner.

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If the date of a purchaser's signature to an act of retrocession be proved, it is a mere pollicitation, until signed or accepted by the other party, and ceases to have any effect the moment his capacity to accept is taken away.

The plaintiffs have argued in this court, that this act of the defendant is binding upon him, and that the institution of this suit is a sufficient acceptance of it on the part of the plaintiffs; but there are many satisfactory answers to this argument:

I. Although the signature to the act is proved, the date is left uncertain, and that uncertainty cannot be supplied by us.

II. The suit cannot be considered as an acceptance of a retrocession, because the averments in the petition are inconsistent with the fact that a retrocession existed; an action of rescission, necessarily, pre-supposes a contract to be rescinded.

III. The signing of that act by the defendant, if its date had been proved, was a mere pollicitation, which ceased to have any effect at the expiration of the charter of the former corporation in 1836. *Louisiana Code, article 1804.*

IV. When the former corporation ceased to exist, the condition of the parties to this suit was fixed, and the plaintiffs have never had since, capacity to accept the retrocession. The defendant owes a sum of money, which the mayor and commissioners of the sinking fund, are alone entitled to receive.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

LODELL vs. BULLITT.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.**

Steam-boats carrying passengers for hire, should be furnished with whatever is requisite or usual, for the safety of those on board.

So, where a steam-boat was destitute of a yawl, and of ropes to throw to

the assistance of a person falling overboard : *Held*, that the owner is liable for the value of a slave of one of the passengers, who fell overboard and was drowned ; the officers and crew using no exertions to save him.

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The plaintiff alleges, that he embarked with his family, servants and baggage, on board the steam-boat James Monroe, owned by the defendant, in July, 1836, from Port Pontchartrain for Pascagoula. That after he went on board, the boat being badly provided with hands, and other things necessary to its safe navigation, the officers in the night induced one of his servants named Job, a good carpenter, worth four thousand dollars, to work as a fireman ; and that about two o'clock in the morning, Job fell, or was knocked overboard, and was drowned.

The plaintiff expressly alleges, that the captain and crew of the boat refused to use the necessary exertions to save his servant ; that the steam-boat was unprovided with a yawl or long-boat, and the necessary ropes and rigging, etc.

He further charges, that the defendant, as owner, is liable for the value of said slave, and prays judgment for the sum of four thousand dollars.

The defendant pleaded a general denial.

The testimony was various, and some of the witnesses made contradictory statements as to the manner of the loss of the slave. It was, however, proved that the steam-boat had no yawl or long-boat, and was unprovided with ropes.

Some of the passengers testified, that the captain declared he saw the boy in the water, once as high as his waist, and that he was so close to him at one time, if he had had a rope he could have thrown it to him. But this same captain declares in his deposition, that he saw the slave only once, and that for a very short time, and the only part visible was his heels, and a hundred boats, all fully manned, could not have saved him.

The district judge was, however, of opinion, from all the evidence, that from the culpable neglect in the officers of the boat, in not providing her with suitable tackle, etc., and in not stopping and putting her about to save the boy, that the owner was liable. The slave was proved to be worth one

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thousand five hundred dollars, for which judgment was rendered.

The defendant appealed.

Watts, for the plaintiff.

C. M. Conrad, for the defendant and appellant.

Martin, J., delivered the opinion of the court.

The defendant, owner of a steam-boat, is appellant from a judgment, by which the plaintiff has recovered the value of a slave owned by him, which fell from on board and was drowned, through the inattention and want of care of the master; and, also, for the want of a yawl or small boat, and ropes necessary for the use of the steam-boat.

The general issue was pleaded.

The testimony of the master was introduced by the defendant, and several passengers were examined as witnesses. The testimony is in some degree contradictory; it, however, clearly appears that the slave fell overboard during the night, and that no assistance was or could have been given him, because the boat was destitute of a yawl, and so ill provided with ropes, that none could be had to be thrown to the assistance of the slave.

Steam-boats carrying passengers for hire, should be furnished with whatever is requisite or usual for the safety of those on board.

So, where a steam-boat was destitute of a yawl, and of ropes to throw to the assistance of a person falling overboard: *Held*, that the owner was liable for the value of a slave of one of the passengers, who fell overboard and was drowned, the officers and crew using no exertion to save him.

We agree with the plaintiff's counsel, that steam-boats carrying passengers for hire, ought to be furnished with whatever is requisite, or usually provided on such occasions for their safety, and that of their servants who accompany them; and a yawl or small boat, is, in our opinion, essential to this object. A steam-boat should not be so ill provided with ropes and loose rigging, that on an emergency none could be found at hand to be thrown to a person accidentally falling overboard.

The plaintiff's counsel has also contended, that the master did not use proper exertions to relieve and save the slave. The defendant has endeavored to avail himself of the testimony of the master, after having given him a release. As might have been expected, his evidence and that of the

other witnesses, do not exactly coincide. In a case like this, the conclusion of the first judge has much weight with us, and in the present, a close examination of the testimony, has satisfied us that he did not err in giving judgment for the plaintiff.

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PARMELY ET AL.
VS.
BRADBURY.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

PARMELY ET AL vs. BRADBURY.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS,

The want of the christian name of the defendant in the petition, if it be a dilatory exception, is waived by a plea to the merits.

The refusal or failure of the garnishees to answer interrogatories concerning property of the defendant attached in their hands, is to be taken as a legal confession of sufficient property in their hands to satisfy the attachment, and to bring the defendant into court.

The law does not require an order of court to the garnishee, directing him to answer interrogatories; the service of a copy of the petition containing the interrogatories, and citation, are a sufficient warning for him to answer.

Where the appellee prays to have judgment so amended, as to give him ten per cent. damages on a protested bill of exchange, he cannot have damages for a frivolous appeal.

This is an action on a protested bill of exchange, drawn by the defendant, in New-Orleans, on Hoopes & Bogart, in Mississippi.

The petition alleges, that H. Bradbury, residing in Tennessee, the drawer of said bill, is indebted to the plaintiffs for

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the amount, with damages, interest and costs; and that an attachment issue against property of the defendant in the hands of Forsyth, Goodwin & Co., and that they be served with process, as garnishees, and ordered to answer interrogatories annexed to the petition, touching the property of the defendant in their hands.

There was no defence, except a general denial, put in by the attorney appointed to defend, and judgment was rendered against the defendant for the amount of the bill sued on, to be paid by privilege on the property attached in the hands of the garnishees.

A rule was taken on the garnishees to show cause why they should not pay over to the plaintiffs the amount of the judgment. The garnishees failed to appear and answer to the rule, which was made absolute, and judgment rendered against them for the amount of the plaintiff's claim. Both the defendant and garnishees appealed.

Strawbridge, for the plaintiff, prayed that the judgment be so amended, as to give him ten per cent. damages on the bill of exchange; and that it be affirmed, with ten per cent. damages, as for a frivolous appeal.

Wharton, for the appellants, assigned for error, that the petition did not state the christian name of the defendant, and should be dismissed, as he was not in court either by his person or property.

2. There was no order of court directing the garnishees to answer the interrogatories.

3. Judgment against the garnishees was erroneously given. If they had property in their hands of the defendant, it could only be reached by a seizure under execution.

Martin, J., delivered the opinion of the court.

The defendant and garnishees are appellants from judgments against them, they both relying on assignment of errors. That of the defendant is, that the petition does not state his christian name; that he was not in court, as no property of his was attached.

The absence of his christian name, if it could afford a dilatory exception, was waived by a plea to the merits. The Code of Practice requires, indeed, that the plaintiff's name and surname should be stated in the petition; but it requires only the name of the defendant. The petition states the initial letter of the first, or christian name of the defendant, and his surname.

The record shows, that the sheriff returned that he had served a copy of the petition and citation on the garnishees, and attached the defendant's property in their hands. The garnishees neglected to appear or file an answer to the interrogatories. The sheriff's return was made on the 3d Monday of May, 1837: the day of the service on the garnishees is not stated; the petition and citation came to the sheriff's hands on the 5th of that month. On the 23d of April, 1838, a rule was served on the garnishees to show cause why judgment should not be entered against them; and on the 28th of the same month, the rule was made absolute. The judgment against the defendant had been signed on the 13th January, preceding. The Code of Practice, article 263, provides, that "If the garnishee to whom interrogatories have been put, refuse or neglect to answer the same under oath, in the delay of the law, such refusal or neglect shall be considered as a confession of his having in his hands, property belonging to the debtor, sufficient to satisfy the demand made against such debtor, and judgment shall be rendered against him for the amount claimed by the plaintiff, with interest and costs." The silence of the garnishees in the present case, was, therefore, a legal confession of their having in their hands sufficient property to satisfy the plaintiff's demand, liable to the attachment; the defendant, therefore, was in court.

The garnishees assign as error, that there is no order of court directing garnishees to answer the interrogatories; that there is no legal authorization for the judgment against garnishees; if they had in their hands property of defendant attached, the only avail was by a sale upon execution.

The law does not require any order of court to the gar-

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FARMELY ET AL
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SHADBURY.

The want of the christian name of the defendant in the petition, if it be a dilatory exception, is waived by a plea to the merits.

The refusal or failure of the garnishees to answer interrogatories, concerning property of the defendant attached in their hands, is to be taken as a legal confession of sufficient property in their hands to satisfy the attachment, and to bring the defendant into court.

The law does not require an order of court to the garnishee, directing him to answer interrogatories; the service of a copy of the petition, containing the interrogatories and citation, are sufficient warning for him to answer.

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PAVAGEAU, F.M.C.

vs.

HIS CREDITORS.

Where the appellee prays to have judgment so amended as to give him ten per cent. damages on a protested bill of exchange, he cannot have damages for a frivolous appeal.

nishee. The copy of the petition containing the interrogatories, and the citation, are sufficient warning of the obligation under which he is to answer. His neglect or refusal, we have seen, is a legal confession of his having assets, and sufficient authority for a judgment against him, after the plaintiff established his claim against the defendant.

The plaintiff has prayed, that the judgment be amended by the addition of damages, at the rate of ten per cent.; and to these he is entitled. He has also prayed for damages for the frivolous appeal; but as he has availed himself of it to have the judgment amended, he cannot demand damages from the appellants, who have afforded him the opportunity of gaining by the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with the addition of one hundred and six dollars and four cents for damages, resulting from the protest of the bill, and costs in both courts.

PAVAGEAU, F. M. C., vs. HIS CREDITORS.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

No appeal lies from an order of court, recognizing a creditor of an insolvent to be a *mortgage creditor*, and paid by preference as such.

The plaintiff having made a surrender of his property for the benefit of his creditors, who appointed syndics, Elisha Crocker presented a note of \$787, the payment of which he alleged was secured by a special mortgage on one of the slaves surrendered by the insolvent. He prayed to be recognized as a mortgage creditor on this slave for the amount of

his note, and paid by preference out of the proceeds of sale of said slave. The syndics resisted his claim; but the judge ordered his petition to be filed, and that he be recognized as a mortgage creditor accordingly. The syndics appealed.

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FORTIER ET AL.
VS.
LABRANCHE.

J. Seghers, for the appellants.

Strawbridge, contra.

Eustis, J., delivered the opinion of the court.

The appellee, Elisha Crocker, the holder of a promissory note of the insolvent, bearing a mortgage, applied to the judge of the court below, to be recognized as a mortgage creditor of the insolvent, and to be paid accordingly. The judge gave an order that he be recognized as a mortgage creditor of the insolvent. We are of opinion, that no appeal will lie from this order. It is merely provisional. It does not prevent the claim of the creditor from being contested on the tableau of distribution.

The appeal is therefore dismissed, with costs.

FORTIER ET AL. VS. LABRANCHE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

A person to whom a slave is adjudicated, cannot avoid the sale and the payment of the price, on the ground that the slave is affected with the redhibitory vice of *habitually running away*, without *administering proof* that this vice existed at or before the sale. The fact of the slave's absenting himself within three days after the sale, and being brought back the next day, is not sufficient, when he is shown to be, in all other respects, of good character.

An agreement by the heirs to rescind a probate sale of a slave, is invalid if

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not made in writing, and where some of the heirs are minors, it cannot be legally made in any form.

This is an action instituted by the heirs and legal representatives of the late Amie Labarre, deceased, against the defendant, to compel him to comply with the terms of the probate sale of a slave which was adjudicated to him at the price of one thousand and fifty dollars, by paying one half in cash and the other half by giving his promissory note.

The defendant pleaded the redhibitory vice of an habitual runaway, with which he avowed the slave was affected at the time of the sale, etc. He, also, relied on an agreement made with the plaintiffs to rescind the sale.

The facts of the case are fully stated in the opinion of the court, which follows.

There was judgment for the plaintiff, and the defendant appealed.

Labarre, for the plaintiffs.

Augustin, contra.

Rost, J., delivered the opinion of the court.

The plaintiffs seek to recover from the defendant the price of a slave adjudicated to him, at a probate sale of the succession of a person whose legal representatives they are. The defendant admits the capacity of the plaintiffs to sue, and, also, that the slave was adjudicated to him, as they allege, but avers that he is not bound to pay the price, because at the time of and before the sale, the slave was affected with the redhibitory vice of habitually running away, and that said vice was not declared at the sale. The District Court gave judgment in favor of the plaintiffs, and the defendant appealed.

Two witnesses, whose testimony is uncontradicted, testify that for several years, and up to the time of the sale, they had known the slave adjudicated to the defendant, and that he was of unexceptionable character; one witness, only, testifies that he absented himself within the three days that

followed the sale, and was brought back the next day. The same witness says, that he was under the impression that the slave had not run away, but that the persons who caught him insisted that he had. We know not who those persons were, and their assertions to the witness, can have no weight with us ; the fact is not proved, and without it, the defendant cannot maintain his exception.

The agreement of the plaintiffs to rescind the sale, if made at all, was not made in writing, and taking into consideration that some of the plaintiffs are minors, it could not have been legally made in any form.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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CROSBY
vs.
MORTON ET AL.
An agreement by the heirs to rescind a probate sale of a slave, is invalid if not made in writing, and when some of the heirs are minors, it cannot be legally made in any form.

CROSBY vs. MORTON ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

Bills of exchange payable *after date*, are not required to be presented for acceptance, as between the holder and endorsers ; it is only necessary to have bills payable *after sight* presented for acceptance, to give them a date.

Endorsements made by a partnership on a bill of exchange, bearing date about three weeks before its dissolution, will be presumed to have been made during the continuance of the partnership.

Interest will not be allowed on damages arising on protested bills of exchange.

This is an action against the endorsers of a bill of exchange, which was protested for non-payment at maturity.

The defendants severed in their answers. The defendant, Patterson, pleaded a general denial, and averred that the

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plaintiff was not the true holder of the bill ; that he knew it was endorsed for the accommodation of the drawer alone ; and, lastly, that the real holder or owner, had given the defendants time, which had not expired.

Morton pleaded the general denial, and denied specially that the plaintiff was the true owner of the bill.

The following is the exact tenor of the bill on which this suit is instituted :—

“ NEW-ORLEANS, 24th February, 1837.

“ Exchange for \$10,000.

“ Seventy days after date of this first of exchange (second, and third, &c.), pay to the order of Morton & Patterson, at the Phoenix Bank, New-York, ten thousand dollars, value received, and place the same to account, as advised by

“ LOUIS I. FOURNIQUET,

“ Messrs. ROBERTSON & BRANDA, Norfolk, Virginia.”

Endorsed—

“ Pay to the order of John Crosby.

“ MORTON & PATTERSON.”

“ Pay to the order of R. G. Dixon, Cashier, &c.

“ JOHN CROSBY.”

“ Pay to the order of J. Delafield, Esq., Cashier.

“ R. G. DIXON, Cashier.”

This bill was sent on to the Phoenix Bank for collection, and the notary of the bank states, in his protest and testimony, that, on the 8th May, 1837, at the request of the bank, he presented said bill to the paying teller of the Phoenix Bank, where it was made payable, and demanded of him payment thereof. He answered, that “ it could not be paid ;” wherefore it was protested, &c.

There is no evidence that the bill was ever presented to the drawees, Messrs. Robertson & Branda, in Norfolk, for acceptance.

The evidence clearly makes out that the plaintiff is the *bonâ fide* holder of the bill ; and it further appears, that the defendants were members of a commercial firm at the date

of the bill, and for some short time thereafter. Their signatures are admitted in the pleadings. EASTERN DIST.
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The District Court gave judgment *in solido* against the defendants for the amount of the bill, and ten per cent. damages thereon, with *legal interest* on the *whole amount*, from protest until payment. The defendants appealed.

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MORTON ET AL.

G. B. Duncan, for the plaintiff.

Preston and Randall, for the defendant and appellants.

Martin, J., delivered the opinion of the court.

The defendants are sued as endorsers of a bill of exchange, and are appellants from a judgment against them.

Their counsel has urged: 1st, That the bill was never presented for acceptance by plaintiff, or any subsequent holder; 2d, That it was paid by the drawer; 3d, The defendant, Morton, was not bound by the endorsement. Interest was improperly allowed on the damages.

It appears that the bill was payable seventy days after date. We are ignorant of any law requiring the presentation of such a bill for acceptance: that of a bill payable after sight is required only for obtaining a date, from which the days after sight may be reckoned. *Chitty, jr.* 39.

There is no evidence of the alleged payment.

Randall, the attorney of the defendants, deposes, that the defendants were partners, and dissolved their partnership about the middle of March, 1837. The bill bears date the 24th of February, 1837; that is to say, about three weeks before the dissolution of the partnership. The period of the endorsement was essentially simultaneous or posterior, and the judge correctly concluded, that the bill was endorsed during the continuance of the partnership.

Endorsements made by a partnership, on a bill of exchange, bearing date about three weeks before its dissolution, will be presumed to have been made during the continuance of the partnership.

The court, in our opinion, erred in allowing interest on the damages. For this last reason, it is ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, as to the defendant, John H. B. Morton; and it is

Interest will not be allowed on damages arising on protested bills of exchange.

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April, 1839.

THATCHER
 vs.
GOFF ET AL.

ordered, adjudged and decreed, that the plaintiff recover from the said defendant the sum of ten thousand dollars, with legal interest from the 8th day of May, 1837, until paid; and the farther sum of one thousand dollars for his damages, with costs in the District Court; and that he pay those of the appeal.

THATCHER vs. GOFF ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.

Where a commercial firm signs an attachment bond as surety, the bond is not thereby vitiated, although the partnership may not be bound; for the partner who subscribes the name of the firm, is in all cases bound.

The attestation of the governor, under the great seal of the state, is the best evidence of a justice of the peace's capacity, next to his commission; and where proof of his signature is not required, or it is admitted, the governor's certificate, although not annexed to the return of the commission, is full evidence of his official capacity.

Where certain notes, payable at the "Branch of the United States Bank at Natchez," are protested by a notary residing in Natchez, who states in his protest that he demanded payment at "The United States Bank," it will be considered as meaning the branch at Natchez, and not the principal bank at Philadelphia.

This case was before the court in May, 1837, and remanded to prove the signatures of the endorsers on the note. 11 *Louisiana Reports*, 94.

The facts of the case are fully stated in the opinion of the court, which follows; and in the former report.

On the return of the cause, when it came on for trial, the plaintiff offered in evidence a document purporting to be the return of a commission from Mississippi, which was objected

to by the defendant's counsel, on the ground that the capacity of the individual calling himself Calvin Miller, a justice of the peace, was not sufficiently shown; the only evidence thereof, being the certificate of the governor of Mississippi, under the great seal of the state, but on a detached piece of paper, purporting to certify that Calvin Miller was an acting justice of the peace, on the 6th, 7th, 8th and 9th days of March, 1838, the dates when the commission, taking and closing the depositions offered, was executed. The objection was overruled, and the defendant took his bill of exceptions.

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The second bill of exceptions was taken by the defendant's counsel to the admission in evidence of the note and protest sued on, because the note purported to be payable at the office of the Branch Bank of the United States at Natchez, and the protest, (made by a notary at Natchez,) states that demand of payment was made at another place, to wit: at the "United States Bank."

On a full hearing of the case, the district judge gave judgment for the plaintiff, against the defendant, and dismissed the petition of intervention. The defendant and intervenors appealed.

I. W. Smith, for the plaintiff.

Starrett, for the appellants.

Martin, J., delivered the opinion of the court.

The former judgment of the District Court in this case, was reversed on appeal, and a new trial ordered at the May term, 1837. See 11 *Louisiana Reports*, 95.

On the return of the case to the inferior court, a rule taken on the plaintiff to show cause why the attachment should not be set aside, on account of the insufficiency of the bond, was discharged. There was judgment for the plaintiff against the defendants, and the petition of the intervening party was dismissed. The defendants and intervenors appealed.

I. The rule to show cause was granted, on the allegation

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Where a commercial firm signs an attachment bond as surety, the bond is not thereby vitiated, although the partnership may not be bound; for the partner who subscribes the name of the firm is in all cases bound.

that the attachment informally issued; there being no bond with security given, according to law.

2. That if any such bond was ever given, it is of no avail, inasmuch as the *firm* represented as the *surety* therein, has been protested and has stopped payment.

The informality in taking the bond complained of, is, that it is subscribed by a commercial firm, as surety for issuing the attachment. We are not ready to say that this vitiates the bond. The partner who subscribes the name of the firm, is in all cases bound. It is, therefore, useless to examine whether the firm itself is, or is not bound, when the bond is given for the affairs of the partnership, or with the consent of all the partners, which must be presumed until it be denied.

In relation to the second ground assumed in the rule, there is no evidence of the alleged insolvency or insufficiency of the surety, given in the bond. The rule was, therefore, properly discharged.

II. Our attention is next drawn to two bills of exception. The first is to the admission of a deposition, on the ground that the official capacity of the officer who received it was not shown.

The commission was directed to any justice of the peace of the county of Hinds, in the state of Mississippi. The return is signed by a person who calls himself Calvin Miller, a justice of the peace for said county. A certificate of the governor of the state, attests, that Calvin Miller was a justice of the peace for the said county, at the date of the return to the commission. This certificate is on a separate sheet of paper, which comes up with the record, but does not appear to have ever been annexed to the return of the commission.

It does not appear to us that the deposition was improperly admitted. The only objection to it was, the want of proof of the official capacity of the commissioner. The attestation of the governor, under the great seal of the state, was the next best evidence to the justice's commission, which cannot be expected to be sent to this state, with the return to the commission for taking the deposition. The signature of the

The attestation of the governor under the great seal of the state, is the best evidence of a justice of the peace's capacity, next to his commission, and where proof of his signature is not required, or is admitted, the governor's certificate, although not annexed to the return of the commission, is full evidence of his official capacity.

justice does not appear to have been proven, but we must presume that proof of it was not required, or that it was admitted, since no objection was made on that score. We are not to look for objections out of the bill of exception.

III. The second bill of exception which it becomes necessary to notice, is taken to the admission of a document in evidence, purporting to be the note sued on, which was made payable at the office of the Branch Bank of the United States at Natchez; and another instrument of writing, purporting to be the notarial protest of the note, showing that a demand of payment had been made at another and a different place, to wit, at the *United States Bank*. These documents were properly received in evidence. Their admission did not prevent the appellants from showing that the demand was not made at the proper place, even admitting this to be the case.

IV. On the merits, the handwriting of the makers and endorsers of the note was fully proven. The notes were made payable at the office of the Branch Bank of the United States at Natchez. It is, however, contended, that the demand was not made there, but, as appears from the protest itself, at the *United States Bank*, by a notary public residing at Natchez, there commissioned and sworn; and the protest is dated on the day upon which the call was made at the bank, at the notary's office in the city of Natchez. The court correctly concluded, that the words *United States Bank*, meant the office of the branch of that bank at Natchez, and not the office of the Bank of the United States, which was by law located in the city of Philadelphia.

Judgment was, therefore, correctly given against the defendants; they having pleaded the general issue only, and full proof of their signing and endorsing the notes sued on, having been administered.

It is true that the defendant, Goff, filed a separate and supplemental answer, denying that the plaintiff is owner of the notes, and averring that he is not in court, either by his person or his property; and, also, that he has already been sued in the state of Mississippi.

The conclusion to which we have come, establishes that the property attached was that of the defendants. Neither

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VS.
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Where certain notes, payable at the branch of the United States bank at Natchez, are protested by a notary residing in Natchez, who states in his protest that he demanded payment at the United States Bank, it will be considered as meaning the branch at Natchez, and not the principal bank at Philadelphia.

EASTERN DIST. of the averments in the supplemental answer is supported by
April, 1839. evidence.

**PILIE
 vs.
 STEWART.**

The petition of the intervening party was correctly dismissed, as they did not administer any proof of property in the goods attached.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

PILIE vs. STEWART.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.**

The defendant's counsel may require the clerk, on the cross-examination of the *first witness*, to take down his answer in writing, even when neither party desired it at the commencement of the examination.

Where the judge refused to allow the testimony to be taken down in writing by the clerk, after the examination of witnesses had commenced, judgment was reversed, and a new trial awarded.

This case comes up on the following bill of exceptions :

On the trial, a witness for the plaintiff was called and examined in chief. He was delivered over to the counsel of the defendant, who propounded a question and desired the clerk to take down the answer in writing. The judge interposed, and decided that the testimony could not be taken in writing, as neither party had desired it at the commencement of the examination. The defendant's counsel observed, that he was under the belief that the testimony in chief had been taken down, and the plaintiff's counsel made no objection to taking the testimony in writing.

The court stated it was the uniform practice for the party who desired the testimony to be taken down in writing, to apply to the clerk for that purpose, when the evidence was commenced. The defendant's counsel excepted to this opinion of the court.

From judgment for the plaintiff, the defendant, after an unsuccessful effort to obtain a new trial, appealed.

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April, 1839.

PILKE
VS.
STEWART.

Benjamin, for the plaintiff, insisted that the bill of exceptions could not be sustained. It was the duty of the defendant to see that the testimony was taken in writing, if he wishes to appeal. The judge could not order it *ex-officio*. § *Louisiana Reports*, 129. It was, therefore, incumbent on the defendant to require it; and if he failed to do so, even through mistake, he had the right, after the examination of the witness was closed by plaintiff, to require of the court to have the same examination renewed and reduced to writing; his remedy was clear. He might have required a statement of facts, which he neglected to do, before taking his appeal, and this neglect shows clearly that his object was delay, and not to have the merits of his case submitted to the court. *Code of Practice*, 601 *et seq.*

Worthington, contra.

Eustis, J., delivered the opinion of the court.

On the trial of this cause, the counsel for the defendant, on the cross-examination of the first witness, requested the clerk to take down in writing the answer of the witness to the first question propounded by the counsel for the defendant. The judge decided that the testimony could not be taken in writing, as neither counsel desired it at the commencement of the examination. The counsel for the defendant declared, that he was under the belief that the testimony in chief had been taken down in writing. The counsel for the plaintiff made no objection to the request of the counsel for the defendant, to have the testimony reduced to writing.

Notwithstanding our indisposition to interfere with the discretionary power of inferior courts, as to the manner in which causes are to be conducted before them, we think that we are bound to give the party relief in the present case. The application was made as soon as the first witness of the plaintiff, sworn in this cause, was under cross-examination.

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April, 1839.

BOSWELL
vs.
ZENDER.

by the defendant's counsel, and we think, (particularly as the opposite counsel made no objection,) that the judge erred in refusing the application of the counsel to have the answer of the witness reduced to writing.

Judgment reversed, and cause remanded for further proceedings, according to law.

BOSWELL vs. ZENDER.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The holder of a note, endorsed in blank, may institute suit in his own name, whether he be the owner, or the note has been put in his hands for collection.

A note endorsed in blank cannot be distinguished from one payable to bearer, which may be put in suit by any one in possession, when there are no allegations that it was lost or stolen, or that the possessor came by it unfairly.

This is an action on three several promissory notes, signed by the defendant, payable to himself, and endorsed by him and the plaintiff, amounting to \$800 and costs of protest, for which the plaintiff prays judgment.

The defendant admitted his signature to the notes, but averred, that no valid or valuable consideration was ever given for them; that the plaintiff is not the owner, and never paid any valuable consideration, but took them, knowing that no consideration had been given to the drawer; that they were given for part of the price of two plantations on the Metaire Road, which were to be laid out into lots, and he has received no title for his share, &c.

The testimony supported the plaintiff's demand, and the defendant offered no evidence.

There was a verdict and judgment for the plaintiff, and the defendant appealed. EASTERN DIST.
April, 1839.

Benjamin, for the plaintiff.

BOSWELL
VS.
KENDER.

M^r Millen, for the appellant.

Martin, J., delivered the opinion of the court.

The defendant, sued on a promissory note, suggests, as grounds for the reversal of the judgment, that there was no consideration for the note, or that it failed; and that the plaintiff is not the holder of the note.

There is no evidence on the record but the notes sued upon, and a document which is headed "testimony of Boswell, (the plaintiff) filed 19th February, 1838," and the receipt of the treasurer of the Metairieville Company. The notes are payable to the order of the drawer, (the defendant) and endorsed by him, and by Boswell, the plaintiff. The testimony shows that the notes were given in part payment of the share of one Koster, in the stock of the Metairieville Company; Koster's share having been purchased by the defendant. There is no evidence of the interest of Boswell in the said notes, nor of his being the holder of them, except his possession. Whether he sues in his own right, or for the use of the company, does not appear. This court has held, that a note endorsed in blank, cannot be distinguished from a note payable to bearer, which may be put in suit by any one in possession of it. There is no doubt, that when the note is alleged to have been lost or stolen, the holder may be called upon to show that he came fairly by it. In the present case, it is not alleged that the note was either lost or stolen, nor that the plaintiff obtained it by unfair means: neither is any suspicious circumstance urged. It is proved that the note was given for a fair consideration, which is not shown to have failed, to wit: As shown by the receipt of the treasurer of the Metairieville Company, in part payment of a share of its stock. Whether the plaintiff received the said note from the company in payment of any claim, or whether it was put into his hands for collection,

A note endorsed in blank, cannot be distinguished from one payable to bearer, which may be put in suit by any one in possession, when there are no allegations that it was lost or stolen, or that the possessor came by it unfairly.

EASTERN DIST. does not appear. In either case he might, the note being
April, 1839. endorsed in blank, institute a suit in his own name.

**BANK OF U. S.
 vs.
 ELLIS.**

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

*The remainder of this case is to be found
 between 512 & 513 PP.*

BANK OF THE UNITED STATES vs. ELLIS.

14L 368
 105 472

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
 PRESIDING.**

Where an endorser of a bill has not received notice of protest, but afterwards acknowledges he is bound, and promises to pay, with a full knowledge of the irregularity and want of notice, he will be held liable.

The defendant was sued as the last endorser on a bill of exchange, drawn at sight, and protested for non-acceptance. The draft was drawn at New-York, by M'Laughlin, on Weaver, in Selma, Alabama, dated the 10th of November, 1836, payable at sight, on the first of January following. On the 28th of November, a notary in Mobile, declared he had made diligent search and strict inquiry for Weaver, to present the bill for acceptance, but could neither find him or any one authorized to accept for him. The bill was protested, and notices of protest sent to New-York. The defendant had left Mobile for New-Orleans, and no notice of protest was sent to him, or put in the post-office for him.

The agent of the bank at New-York inclosed the bill with the notices of protest, and wrote to the assistant cashier of the bank at New-Orleans, with directions to demand payment of Ellis. This letter and the notices of protest, with the bill, were shown to Ellis, who declared to the assistant

2 P 512

L. Peirce, for the defendant, cited the cases of *Cox et al vs. Hunter's Heirs*, 10 *Louisiana Reports*, 426 ; *Code of Practice*, 983, 996 ; *Roland vs. Stephens*, 3 *Louisiana Reports*, 463.

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April, 1839.
OAKLEY ET AL.
VS.
DUCKER.

Rost, J., delivered the opinion of the court.

The plaintiffs, residing in the parish of New-Orleans, sued out an attachment against the property, effects, rights and credits of the defendant, whom they alleged to be a resident of the state of Mississippi, and the sheriff attached under it a parcel of cotton deemed of sufficient value to satisfy the claim. The return of the writ bears date the second Monday of June, 1837. On the 23d of the same month, the defendant came into court and filed an exception, praying for the dismissal of the attachment, and that he might be dispensed from answering to the merits, on the ground that he was a citizen of the state of Louisiana, residing in the parish of Concordia. In November following, upon the suggestion of counsel, that the defendant had died since the institution of the suit, leaving a minor daughter his only child and heir, the court appointed a curator *ad hoc* to represent her, and ordered that he be made a party to the proceedings. The curator came into court, and filed a plea to the jurisdiction, on the ground that the succession of the defendant had been opened in the parish of Concordia ; that one Edward Sparrow had been regularly appointed there curator of absent heirs, and was administering the succession, and that all actions for money, pending in the state against the deceased at the time of his death, must be cumulated and prosecuted before the judge of the place where the succession is opened, contradictorily with the curator.

The facts set forth in the answer of the curator *ad hoc* are admitted to be true, and upon them the Parish Court decreed that the cause be transferred to the Probate Court of Concordia, in the situation in which it then was, there to be cumulated with the proceedings in the succession of the defendant. From this judgment, the plaintiffs appealed.

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OAKLEY ET AL.

VS.

DUCKER.

In an attachment case commenced in the Parish Court of New-Orleans, where the defendant died during the pendency of the suit: *Held*, that the power of the court of general jurisdiction ceased, and the cause was ordered to be transferred to the Court of Probates for the parish in which the succession was opened.

The succession of a non-resident dying in the state is opened in the parish where he owned real estate; or in the parish in which his principal effects are situated, if he had effects in several parishes; or in the parish where he died, if he had no immoveable property in the state.

All claims for money must be brought in the Court of Probates for the parish in which the succession is opened, whether the deceased had his residence and domicile in the state, or out of it.

Their counsel have contended in this court, that the succession in Louisiana is merely ancillary to the principal administration in the state of Mississippi, and is not governed by the general laws which regulate the settlement of successions; and further, that property belonging to minors who reside out of the state may be attached for debt in our courts.

If the first ground assumed was well founded in law, the facts of this case would not bring the plaintiffs within the exception. There is no proof in the record, showing that the defendant died in the state of Mississippi; that he had property there, and that his estate is under a regular course of administration, at the place of his alleged residence. The evidence shows, that his daughter resides in Philadelphia, and that he never had his family with him. We could, under no circumstances, take this case out of the usual course of administration here, unless it was shown that another existed elsewhere; but we are of opinion that, under the law, the distinction contended for does not exist.

Article 929, of Louisiana Code, provides that the opening of a succession takes place in the parish where the deceased owned real estate, if he had neither *domicil* nor *residence* in this state; or in the parish in which it appears by the inventory his principal effects are situated, if he had effects in different parishes; or, finally, in the parish where the deceased died, if he had no *residence* nor *immoveable* effects within the state.

These provisions embrace all ancillary successions; they do not in any manner distinguish them from others, as to the mode of administering them; and article 924 of the *Code of Practice*, which gives to the Court of Probates of the place where the succession is opened, the exclusive right and power to decide on claims for money, which are brought against successions administered by curators, executors or administrators, applies to them as well as to those of persons who had their residence and domicile in the state at the time of their death.

In the cases relied on by the plaintiffs' counsel, in support of the second point made, the successions were either not

administered by curators, executors or administrators, or the time of their administration had expired; and the seizin had vested in the heirs. In all such cases, minors, like other persons, are liable to the ordinary jurisdiction of our courts. There is no proof of the time at which the curator of absent heirs was appointed, but the defendant must have died after June, 1837, and the judgment was rendered by the Parish Court in January, 1838. The year of the curator's administration had not expired, and while it lasted, the Parish Court was without jurisdiction.

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DUCKER.

It is therefore ordered and decreed, that the judgment of the Parish Court be affirmed, with costs.

Eustis, J., dissenting.

I concur in the opinion of the court, on the ground that there is no evidence in this case that there is any principal administration of the deceased's estate, other than that to which the representative of the defendant has applied to have the cause transferred.

I do not consider that the circumstance of there being in this state a mere auxiliary administration of the estate of an intestate, domiciliated in his life-time out of the state, and having moveable property under attachment in the courts of general jurisdiction, divests these tribunals of their jurisdiction. I believe that the laws giving the Court of Probates exclusive jurisdiction of matters relating to successions, refer to successions opened in this state, or where the intestate leaves real property within the state; and that where there is a principal administration in the place of the deceased's domicile, and not in this state, that the courts can hold their jurisdiction in cases of attachment, in all cases in which only moveable property is attached, notwithstanding the decease of the defendant.

Those laws could scarcely have for their object to cumulate, in the Court of Probates in a remote parish, all suits against a party who may have died after his property was attached, when the only ground upon which the Court of

EASTERN DIST. Probates is vested with jurisdiction would be a *modicum* of
April, 1839. moveable property accidentally left within the parish.

**WILCOX
 vs.
 BUNDY.**

WILCOX vs. BUNDY.

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

In dissolving an injunction, not more than 20 per cent. damages can be allowed, unless damages to a greater amount *be proved*. It is not sufficient to add fifty dollars to the damages, as counsel fees, which the party will have to pay.

The plaintiff obtained an injunction to stay the execution of a judgment which Bundy had obtained against him, amounting to three hundred and eighty-nine dollars, on the ground that Madame M'Dougall agreed to loan him the money to pay off the judgment, if the creditor would subrogate her to all his rights against his debtor, which he refused, except to give a simple receipt. The plaintiff in injunction, went before a notary and offered to comply with his proposition, but the creditor by his counsel and agent, refused to give a receipt, pursuant to the requirements of the Louisiana Code, article 2156, and ordered the sheriff to seize and sell property.

The defendant averred, that the petition of injunction set forth no cause of action, and prayed that it be dissolved with all damages and costs against the principal and surety *in solido*.

On the trial, it was admitted the controversy turned upon the construction of articles 2156, 2163-4, of the Louisiana Code.

That the plaintiff offered to pay the money and the defendant offered to give a simple receipt. The plaintiff

wanted the receipt to set forth that the money was borrowed from Madame M'Dougall, agreeably to article 2156, of the code, which the defendant refused. Whereupon the plaintiff sued out his injunction.

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April, 1839.

WILCOX
vs.
BUNDY.

On hearing the parties, the parish judge dissolved the injunction, with ten per cent. interest, twenty per cent. damages, and fifty dollars counsel fee, which the party would have to pay. The plaintiff in injunction appealed.

Barker, for the plaintiff, insisted that the tender of payment on the terms stated, in the presence of the notary, was sufficient to put the adverse party in default, and that it was all he could ask. The law subrogated the person advancing the money to all the rights of the creditor. *Louisiana Code, articles 2156, 2163-4.*

Roselius, for the defendant, prayed for the affirmance of the judgment, with damages, as for a frivolous appeal.

Eustis, J., delivered the opinion of the court.

On dissolving an injunction in this case, the judge condemned the plaintiff and his surety to pay twenty per cent. damages, ten per cent. interest, and fifty dollars counsel fees, which it was proved the defendant would be obliged to pay in consequence of the injunction obtained by the plaintiff.

The law of the 25th of March, 1831, provides, that in case the injunction be dissolved, the court, in the same judgment, shall condemn the plaintiff and surety jointly and severally, to pay to the defendant, interest at the rate of ten per cent. per annum, on the amount of the judgment, and not more than twenty per cent. as damages, unless damages to a greater amount be proved. It does not appear that any proof was administered, except as to the counsel fees. If a greater sum than twenty per cent. was allowed, proof of damages to a sum exceeding that amount should have been made under the statute. The sum of fifty dollars, is, therefore, disallowed. The judgment is therefore reversed, so far as relates to that sum, and confirmed as to the residue: the

In dissolving an injunction, not more than twenty per cent. damages can be allowed, unless damages to a greater amount be proved. It is not sufficient to add fifty dollars to the damages as counsel fees, which the party will have to pay.

EASTERN DIST. appellee to pay the costs of appeal, and the appellant those of the court below.

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D'ORGENOY ET AL

vs.

DROZ.

D'ORGENOY ET AL vs. DROZ.

181 282
62 585
62 2084

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

13 382
122 1056

The *price* of a sale must be serious; and a price which is out of all proportion with the value of the thing sold, invalidates the sale.

A sale without a *price* is not binding as such, on the parties; but the act may have effect as a donation, if it contains nothing contrary to public order; provided the purchaser can receive a donation from the vendor, and no injury results to third persons.

It has been adopted as a general rule of law, that a sale without a *price* is a donation.

This is an action of jactitation, or slander of title, and injunction to restrain the defendant from selling the land or piece of ground described in the petition, of which the plaintiffs allege they are the true owners. They call upon the defendant to come forward and state by what title he claims; and that he be forever enjoined from setting up claim or title to the same; and that the plaintiffs be declared the legal and true owners.

The defendant pleaded a general denial; and set up title by purchase from Madame Marie Rose Ramis, whom he calls in warranty. He also pleads prescription.

The facts of the case are more fully explained in the following judgment of the District Court:

The ancestor of plaintiffs purchased of Antonio Ramis a tract of land of two arpents front on the Bayou Road, in two parcels—the first, of one and a quarter arpents front, by four

and a half in depth, on the 16th July, 1805; and the other three quarters of an arpent front, by four and a half in depth, on the 25th January, 1806.

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By a subsequent agreement, he acquired, for the same consideration, all the depth beyond four and a half arpents. This agreement was made by authentic act, September 24th, 1807.

The controversy between the parties relates to a tract of land immediately in the rear of the four and a half arpents depth of the front tract of two arpents just mentioned, and contained within the prolongation of the side lines of the front tract, to the property of the estate of the late John Gravier.

The plaintiff asserts himself to be the owner, in virtue of the contract with Ramis of the 24th September, 1807. The defendant claims title under Madame Marie Rose Ramis, widow Castanedo, who is a party to this suit, and who alleges, that she is the proprietor of the tract in question, by inheritance from her father, who was never legally divested of his title to the same.

The argument has turned upon the construction of the act of 24th September, 1807. Its tenor is as follows: "Before Peter Pedesclaux, notary, &c., appeared Antonio Ramis, who declared that, on the 16th July, 1805, he should have sold, by act before the same notary, to Mr. F. L. d'Orsenoy, one and a quarter arpents of land front on the Bayou St. John Road, left side going out of town, and four and a half arpents in depth, with all its buildings, joining on one side a lot of Michel, free negro, and on the other the seller, for the sum of two thousand six hundred dollars; likewise, he should have (or had) sold, by act also before said notary, on the 28th January of last year (1806), three quarters of an arpent of land front, adjoining the preceding, with the same depth of four and a half arpents of depth, for the sum of sixteen hundred dollars, which two sums make together that of four thousand and two hundred dollars: and for the same consideration he has, by these presents, sold, &c., all the depth which the two arpents might have over and above the

EASTERN DIST. four arpents and a half, already related, to Mr. F. Le Breton
April, 1839. d'Orgenoy, here present, and accepting for himself, his heirs
D'ORGENOY ET AL and assigns, to be by him enjoyed and disposed of as a thing
VS. belonging to him, and to take possession of it when it shall
DROZ. seem good to him."

The defendant contends, that this act cannot be considered as a sale, for want of one of the essential attributes of that contract, to wit, a price; that the price mentioned (four thousand and two hundred dollars) is that already stipulated for the front tract, and consequently, that there was nothing left to serve as a price for the back tract. He has quoted many authorities to show, that the want of a price in a contract of sale is so radical a defect, as to vitiate it, and render it utterly null and void, even between the parties.

Of the correctness of this doctrine, abstractedly, I have no doubt; the authorities are too numerous and positive, to leave the least uncertainty upon it; but is it applicable to the present case?

Following, then, at once, the words of the contract of the 24th September, 1807, and the intention of the contracting parties, I am bound to view that contract as a supplement of the sales of the 16th July, 1805, and the 28th January, 1806; and, as such, that the consideration is included in the price originally stipulated.

There is another question in this case, which has suggested itself to my mind. This suit is in the nature of an action for slander of title. In such an action, by the decision of the Supreme Court, in the case of *Livingston vs. Heerman*, in 9 *Martin's Reports*, 715, the burden of proof is upon the defendant. Before the defendant could be adjudged to be the proprietor of the land in dispute, it would therefore have been necessary for him to establish the title of Ramis to the said land. Now, the title of Ramis, given in evidence, to wit, the sale from Joseph Cultice to Ramis, of the 23d December, 1786, does not give the land of Gravier as a back boundary, nor does it give any precise depth to the two acres in question. The description of the extent of the tract is, "two arpents front, and the depth which it may have, and which may belong to it."

Ramis's title, however, cannot be called in question between the present parties, for they both claim under it. EASTERN DIST.
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Proceeding, therefore, to decide according to the views above developed, and no damages having been proved, it is adjudged and decreed that the injunction herein issued be made perpetual; that the defendant be perpetually enjoined from pretending title to the property described in the petition; and that the defendant pay costs. D'ORGENOY ET AL
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From this judgment the defendant appealed.

Denis and Labarre, for the plaintiffs.

Roselius, for defendant, contended,

1. The act of the 24th September, 1807, cannot be considered as a sale; it wants one of the essentials of that contract, the *price*. The consideration paid for another tract of land sold in 1805 and 1806 cannot be considered as the price of a much larger quantity sold in 1807, without subverting every principle of law. The intention of the parties must not be lost sight of; but when the law has declared in what manner the parties shall manifest their intention, its provisions are not to be disregarded. This is neither a sale nor a donation.

2. Both parties claim under Ramis, therefore his title cannot be questioned by either.

Rost, J., delivered the opinion of the court.

In 1807, François Le Breton d'Orgenoy, the ancestor of the plaintiff, and Antonio Ramis, entered into an agreement, by notarial act, to the following effect:

"That whereas Ramis had sold to d'Orgenoy, in July, 1805, an arpent and a quarter front of land on the Bayou Road, by four and a half arpents in depth, for the sum of two thousand six hundred dollars; and in January, 1806, three quarters of an arpent front of land on the Bayou Road, with the same depth, for the sum of sixteen hundred dollars, which two sums made together that of four thousand two hundred dollars. For the same consideration, he, the said

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Ramis, sold, ceded, abandoned and transferred to the said d'Orgenoy all the depth which the aforesaid two arpents of land might have under his title, over and above the four arpents and a half already conveyed, to be by him enjoyed and possessed as his property."

On the 11th of November, 1836, both parties to the contract being then dead, the heir at law of Ramis sold to the defendant, for a valuable consideration, the property attempted to be conveyed by the aforesaid act. The defendant having, shortly after his purchase, advertised it to be sold in lots at public auction, the plaintiffs enjoined the sale, and claimed title under the conveyance of Ramis. The defendant cited his warrantor, who answered, that she also claimed title under Ramis, her father, by inheritance, and that she never had been legally divested of it in favor of the plaintiffs, or of any other person. The District Court gave judgment in favor of the plaintiffs, and the defendant appealed.

Ramis had a good title to a large tract of low land back of the four arpents and a half, and the rights of the contending parties in relation to it depend exclusively upon the legal effects of the notarial act already mentioned. The defendant's counsel contends, that the consideration named in this act had already been received by the vendor, as the consideration of the previous sales; that the act purports, upon the face of it, to be a sale, and containing no price, is null and void.

The price of sale must be serious; and a price which is out of all proportion with the value of the thing sold, invalidates the sale.

The facts may be as stated by them, but the consequences which they deduce from those facts are not justified by law. The price of a sale must be serious; and Pothier says, that a price which is out of all proportion with the value of the thing sold, invalidates the sale: for instance, if an extensive landed estate was sold for a crown, the price would not be serious, for the price being nothing more than the valuation of the thing which the contending parties have agreed upon, a price which bears no proportion to that value cannot pass for a serious valuation, and is not in reality a price; but the same author goes on to say, that such a contract is a donation, improperly called a sale.—*Pothier Contrat de Vente*, 19.

The Roman laws quoted at the bar all say that a sale without a price, or with an imaginary price, is not a sale, and is not binding as such upon the parties, for the want of one of the substantial requisites of that species of contract: but under that system of jurisprudence, as well as under ours, such acts took effect as donations, provided they contained nothing contrary to public order; and provided, further, that the purchaser could receive a donation from the vendor, and that no injury resulted to third persons. Those laws seem to have made no difference between acts stipulating a price which the vendor did not intend to receive, and such as contained an imaginary price, or no price at all; and, if the sale of a valuable estate made for a crown is a donation, because a crown is not a price, it is difficult to conceive why a sale mentioning a consideration which is less than a crown, or, as the defendant alleges in the present case, absolutely nothing but words, should not carry with it the same legal effects. Voët, in his Commentary upon the Pandects, goes fully into the subject, and treats it with his usual precision. Speaking of sales without a consideration, he says:—"Nec reprobatae fuerint, si quis eas celebrare voluerit, quoties neque legibus publicis, neque tertio per hujusmodi imaginarias venditiones fraus fit. Neque subsistant inter eos, inter quos, jura donationes prohibuerunt. Et ex hisce explicandum puro, quod a Paulo scriptum est, nudam & imaginarium venditionem pro non facta esse, & ideo nec alienationem eius rei intelligi; scilicet pro non facta est, in quantum valere nequit tanquam venditio, quia, deficiente pretio, emptio in sui deficit substantia; sed quod dominium non transibat ex venditione, ex donatione tamen, quæ imaginariæ inest venditioni, transferebatur mediante traditione."—Commentarius ad Pandectas, tom. 3, lib. 18, tit. 1, l. 1.

Under the Spanish laws, it was not necessary to mention, in an act of donation, the value of the thing given; and the deed under which the plaintiffs claim would be similar to acts of donation, as they were made at the time of its date, if Ramis had said *I give*, instead of saying *I sell*. The words which the notary used, without a proper understanding of their legal meaning, ought not to prevent us from carrying into effect the intention of the parties.

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A sale without a price is not binding as such on the parties; but the act may have effect as a donation, if it contains nothing contrary to public order; provided the purchaser can receive a donation from the vendor and no injury results to third persons.

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It has been adopted as a general rule of law, that a sale without a price is a donation.

Indeed, we do not consider the legal question which this case presents as open for argument at this time. So far back as 1818, this court decided it, in the case of *Holmes and others vs. Patterson*, 5 *Martin's Reports*, 693. That decision went much further than is necessary for the purposes of the present case; for the donation, in that instance, had not been accepted by the donee before the death of the donor, and neither the act of donation, nor the possession of the thing given, had been delivered. The court held the act to be valid notwithstanding, because the donor had made no other disposition of the property. Without expressing our concurrence in all the views taken by the court of the legal consequences of the facts of that particular case, we adopt the rule settled by the decision, that *a sale without a price is a donation*; and, considering the loose and irregular manner in which title deeds are generally made in newly settled countries, and the paramount duty of courts to maintain ancient possessions, and to give effect to the titles under which they are held in any manner which the law justifies, we hold it to be founded on the soundest principles of justice, and the decision upon which it rests will never be disturbed by us.

The plaintiff's ancestor acquired the land in controversy under a donation from the defendant's author, and they have been in possession under it ever since. That donation, as long as it exists, is conclusive against the pretensions of the defendant; and unless it had been set aside and rescinded, in an action instituted for that purpose, the defendant had no right to disregard it, by attempting, as he has done, to sell the property which the plaintiffs possessed under it.—*St. Avid vs. Weimpreinder's Syndic*, 9 *Martin*, 648; *Ham vs. Herreman*, 1 *Martin, N. S.*, 536; *Barbara vs. Saucier*, 5 *Ibid*, 361; *Yocum vs. Bullitt*, 6 *Ibid*, 364.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; reserving to the defendant his rights on the warranty.

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No relative nullities in titles, accompanied by possession, not even those resulting from fraud, can be inquired into collaterally: it must be by direct action.

Naked possession for more than a year, creates the presumption of ownership in the possessor, sufficient to put the right owner upon proof of his title. He must make that proof as plaintiff in a direct action for that purpose, and is not permitted to throw the burden of proof on the possessor, by alleging title when he is sued for a disturbance.

So, the person claiming to be the right owner, when sued for disturbance, cannot bring a petitory action until after judgment in the possessory one; and if he is condemned, not until he has satisfied the judgment.

Under the Spanish law, in making donations, no particular form or clause was required; the consent of the parties, the thing given, and the tradition were sufficient. Even verbal sales and donations were permitted, when tradition followed.

A sale without a *price*, or for a fictitious price, although null as a sale, for want of the essential requisites of that contract, is nevertheless valid as a donation, provided tradition follows.

Roselius and *Quemper*, for the defendant and appellant, solicited a re-hearing in this case.

1. This action is essentially a petitory one, and the plaintiff must recover on the strength of his title. He claims the property under a *sale* to his ancestor in 1807. This is the only title which he sets up. The sale is expressly denied, and the issue is a *sale* or *no sale*. The arguments of counsel on both sides were exclusively directed to this point, and no other. The plaintiff never dreamed that the land had been given to his ancestor; that idea is repudiated by his own assertions from the beginning to the end.

We take it for granted, that courts are bound to decide the questions that are submitted to them by the parties litigant. Hence the rule, that when the court expresses an opinion on a point not raised in the pleadings, such decision does not form *res judicata*, but is considered merely as an *obiter dictum*.

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We are at a loss to conceive on what principle the court could determine that the property claimed by the plaintiff under a *sale* should be adjudged to him as a *donation*. When a thing is claimed by a particular title, which is set forth by the party, he cannot substantiate his right to it by producing another title. The *allegata* and *probata* must correspond. This is not mere form, but substance ; but even if it were merely form, the court is not at liberty to disregard it.

2. It appears to us, that the moment it was ascertained that the act on which the plaintiff's claim to the property is predicated was not a sale, judgment of non-suit ought to have been rendered against him, reserving to him the right of claiming it under the donation. But it may be asked, why not decide the question at once ? Why prolong the litigation between these parties unnecessarily ? To this we have two satisfactory answers : first, we say, no person ought to be deprived judicially of what he believes to be his property, without an opportunity being afforded him of defending his rights ; and, in the second place, we say, that the litigation will not be useless ; for if any attempt is ever made to recover the property under the donation, whether direct or disguised, we have the most triumphant means of defence : and with due submission to the court, those means of defence can be made use of just as well (and, indeed, much more effectually) by way of exception to the plaintiff's action, as in a direct suit for the rescission of the donation, although a different opinion seems to be intimated in the opinion of the court. The action is temporary, but the exception is perpetual. This rule has been repeatedly recognized by this court. In the case of *Bushnell vs. Brown's Heirs*, 4 N. S., p. 500, the Supreme Court say, "We think the district judge erred. It is true the plaintiff could not have been heard in a suit against his vendors, but it does not follow that he could not use as a shield what he could no longer use as a weapon. *Quae temporalia sunt agendam, perpetua sunt ad excipiendum.*" So, in the case of *Thompson vs. Milburn*, 1 N. S., p. 469, the rule is, "*Lo que tiene*

tiempo limitado para demandarse in juicio, es perpetuo para exceptionarse.—Febrero, p. 2, lib. 3, cap. 1, sec. 6, No. 250. EASTERN DIST.
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The same doctrine is also fully developed by Toullier, in his 7th volume, p. 705, No. 596, *et seq.* Our right, therefore, to urge the grounds of nullity or rescission, by way of exception against the plaintiff's action, is indisputable. But why did we not avail ourselves of this right? We answer, that we could not defend ourselves against the effect of a donation, when the sole foundation of the claim to the property was a sale. Now, admitting it to be true, as the court observes, that the notary who drew up the act, through ignorance, used the word "sale" instead of the more appropriate expression "donation"; that the name given to a thing cannot change its substance, we ask, is that a reason why this circumstance should be made instrumental in depriving the appellant of his legal rights? The more we reflect upon the subject, the more we are convinced, that such a doctrine is fraught with the most dreadful consequences, and cannot receive the sanction of this tribunal. The iniquitous results that must necessarily flow from such a course of proceeding is fully exemplified in the present case. If the plaintiff had claimed the property under a donation, whether direct or disguised, we would have answered, that since the year 1807, Ramis, the alleged donor, had legitimate children born to him: besides this, we have other grounds of defence, which it is not necessary at present to advert to. It suffices to prove, in order to entitle us to relief at the hands of this court, that we have not been fairly dealt with; that substantial justice has not been done. One observation more, before we quit this branch of the subject. We pray the court to bear in mind that the appellee is the plaintiff in the action, and that he relies on a particular title, *i. e.*, a sale, which he sets forth in his petition at full length. We ask again, can he be permitted, without amending his petition, to shift his ground, and recover under a totally different title? or, can the court do that for him, which he would not be permitted to do himself? The case would be different if the appellee was the defendant in the suit; for the defend-

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ant in a petitory action need not plead or produce his title until his adversary has proved his, and then he is, perhaps, at liberty to show any title which he may have to the property. For this reason, we consider, with great deference to the court, that the decision in the case of *Holmes vs. Patterson*, 5 *Martin's Reports*, 693, is by no means conclusive on the subject, and cannot be invoked as supporting the judgment rendered in this cause. In that case the *donee*, as he is *considered*, was the *defendant*; and according to the well known rules governing petitory actions, he had a right to repel the claim of the plaintiff by the production of any title by which he might hold the property. But we apprehend the court would never have made the decision, if *Patterson had been the plaintiff*, and had claimed the slaves, under a *sale*. This decision of the Supreme Court is also inapplicable to the case at bar for other reasons, which will be adduced in the subsequent part of this petition.

3. We have thus far argued on the assumption that the opinion of the court is correct in considering the act of 1807 as a donation; but your honors will pardon us for controverting the correctness of that opinion. We believe the act of 1807 to be a mere nullity, both in form and substance; and that, consequently, it can produce no legal effects whatever. As regards the form, it is destitute of one of the essential requisites to make it a contract of sale, that is, a *price*, for the mention of a price is as indispensable to the form of a contract of sale, as its reality is to the substance. For instance, if an individual says, "I sell my horse to Paul," without mentioning the price, such a contract would be void, for want of form: but, if A says to B, "I sell you my horse for one hundred dollars," and B accepts the proposition, the contract is perfect as to the *form*; yet it would be void as to its substance, if it was proved that the hundred dollars never were paid, and that the vendor never intended to exact the payment of it: in this case it would be a donation disguised under the form of an onerous contract. So, if a person sells a valuable estate for a dollar, the contract is valid as to the form, but is not so as respects the sub-

stance, because the price is not a serious one; and in that case, too, it would be considered as a disguised donation. The example last put is found in the Louisiana Code, article 2439, the last paragraph: "It (the price) ought not to be out of all proportion with the value of the thing; for instance, the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as donation disguised." The contract in the case of *Holmes et al vs. Patterson* was likewise valid as to its form. The court say, "The bill of sale is made for value received. Neither the amount nor the nature of what was given as the consideration of the sale, is expressed or proved." No well founded objection could be made to the form of this contract; for it is not necessary to express the amount of the price, or the consideration in the act, even as the law now stands; it suffices that a price has been agreed upon between the parties, and that legal proof be made of this fact. The correctness of this proposition clearly results from the provisions of the 1894th article of the Louisiana Code, which is in the following words:—"If the cause expressed in the contract should be one that does not exist, yet the contract cannot be invalidated, if the party can show the existence of a true and sufficient consideration." The Supreme Court, therefore, held, in the case of *Holmes et al vs. Patterson*, that the contract was not a sale, because the *value received* was not proved. The defect was in the substance of the contract, not in its form. The act under which the plaintiff in this cause claims the property in controversy is null both in form and substance; it presents, in neither respect, the necessary ingredients of a contract of sale, nor those of a donation. And if this be true, the inevitable consequence follows, that it can produce *no legal effect whatsoever; it is a mere nullity*. It cannot even form the basis of prescription. Another consequence follows with equal certainty, which is, that the plaintiff never had any possession of the property; that, on the contrary, the legal possession has always been in the defendant, and those under whom he claims. It is, therefore, a mistake to say that the plaintiff has been in possession since 1807; for

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neither party has had actual or real possession of the property. There is not a case similar to the present to be adduced in the whole range of the annals of jurisprudence; and most of the elementary writers have taken the principle for granted.

In all the cases, without a single exception, decided by the French tribunals, where irregular donations have been maintained, they were disguised in an onerous contract in due form; most of them contracts of sale, in all of which the price is stipulated, but was alleged and proved to be a simulation. There is but one of the French commentators with whose writings we are acquainted, who discusses the question; that is, *Guilhon Traité des Donations Entre-vifs*, vol. 1, p. 380. This author examines, with great ability and learning, the whole doctrine of disguised donations.—See Nos. 464, 5, 6, and also the entire chapter from page 373 to 461; *Merlin's Répertoire*, verbo *Simulation et Donation*; *Répertoire de la Nouvelle Jurisprudence*, verbo *Avantage Indirecte*.*

4. The Spanish law, under whose dominion this transaction took place, did not recognize disguised donations. When there was a great disparity between the price and the value of the thing sold, it was necessary, to make the contract valid under that system of jurisprudence, that the vendor should make a formal declaration in the act that he made a gratuitous donation of the difference between the price and the real value of the thing sold; and that this donation should be recorded.—See *Tapia-Febrero Novísimo*, vol. ii, p. 168, No. 50.

5. But let us, according to the suggestion of the court, substitute the words "*I give*," in the place of "*I sell*," and indulge in the supposition that the notary used the expunged expressions without a proper understanding of their legal import, (and we cannot refrain from observing, *en passant*, that this is, to say the least of it, carrying the power of interpretation to its utmost verge), can the act, in that form,

* In this work there is a decision of the Court of Cassation of the 17th August, 1817, which says, that the onerous contract in which the donation is disguised must be *perfect in its form*. Vol. i, p. 268.

avail the plaintiff? It is true that, under the Spanish law, it is not necessary to mention in an act of donation the value of the thing given; but still it will be found that the act, thus metamorphosed, cannot stand the test of a legal examination under the Spanish law. By reference to *Tapia-Febrero Novisimo*, vol. ii, p. 492, in the chapter treating of donations *inter vivos*, No. 23, we find the requisites of a valid donation, under that system of law, enumerated; and, among other things, it is required, that whenever the value of the thing given exceeds five hundred *maravedis* of gold, it must be inscribed before the competent judge. So, it appears that, under the Spanish law, recording of donations exceeding a certain amount in value was just as necessary for their validity against third persons, as it is at present under the Civil Code. The defendant is an innocent purchaser, in good faith, and against him the *donee*, or those claiming under him, must prove that the donation was recorded. In the absence of this proof, the donation can have no effect against him.

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Rost, J., delivered the opinion of the court.

The counsel for the defendant makes a false application of the elementary principles to which they refer the court, and misconceive the grounds assumed in the decision, and the extent to which it goes.

The only question which the court considered themselves called upon to decide, was whether the plaintiffs had a title translatif of property upon the face of it, and were in possession under that title; if they possessed and had title, the defendant had no right to inquire into its defects in this suit. The injunction must be perpetuated, and the defendant left to his legal remedy in a direct action. No principle is better settled in our jurisprudence, than that no relative nullities in titles, accompanied with possession, even those resulting from fraud, can be inquired into collaterally. Many of the cases in which it was so determined, are referred to in the decision, and others may be found in the reports. See *Weeks vs. Flower et al.*, 9 *Louisiana Reports*, 379.

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No relative nullities in titles, accompanied by possession, not even those resulting from fraud, can be inquired into collaterally. It must be by direct action.

Naked possession for more than a year, creates the presumption of ownership in the possessor, sufficient to put the right owner upon proof of his title. He must make that proof as plaintiff in a direct action for that purpose, and is not permitted to throw the burden of proof on the possessor by alleging title when he is sued for a disturbance.

So, the person claiming to be the right owner, when sued for disturbance, cannot bring a petitory action until after judgment in the possessory one, and if he is condemned, not until he has satisfied the judgment.

The reason of those decisions is founded in the right which possessors have to institute a possessory action, when they are disturbed either in fact or in law, against whoever causes the disturbance. The title is only introduced to show the beginning and extent of the possession, and is not indispensable to the right of action. Naked possession for more than a year, creates a presumption of ownership in the possessor, sufficient to put the right owner upon proof of his title, and he must make that proof, as plaintiff, in a direct action instituted for that purpose; he is not permitted to throw the burden of the proof upon the possessor, by alleging title, when he is sued for a disturbance, and he cannot even bring a petitory action, till after judgment has been rendered in the possessory action; and if he has been condemned, not until he has satisfied the judgment given against him: *Code of Practice, article 55*. This is one of the reasons, if not one of the consequences of the maxim of law, *beati possidente*. It is in vain to say, then, that if the title of the plaintiffs had been called a donation, the defendant could have made a triumphant defence; since if the title was good on the face of it, as a donation, and possession had passed under it, the defendant was estopped and could make no defence at all. The error was that of the defendant, not that of the court: he should have known that after a possession of near thirty years, the plaintiffs were entitled to be heard before their land was sold from under them.

In the case of *Bissel and Wife vs. The Heirs of Erwin*, this court held valid as a sale, an act which the parties believed to be a lease; and the correctness of that decision never was doubted. To dismiss this action for the mistake of a name, would have been trifling with justice and the rights of the plaintiffs. The case of *Delogny vs. Smith*, was very different from the present; there the plaintiffs had expressly averred in their petition, that they claimed by inheritance from their mother, and by a donation from their father. Upon the trial, they attempted to establish a title by a transaction between their father and themselves. The defendant objected to the introduction of that evidence, and the court considering it as

contradicting the averments of the petition, sustained the objection. In the present case, the plaintiffs have not two different titles : that found in the record, is the only one upon which they relied from the beginning ; they have, it is true, called it a sale, when it was a donation ; but whatever be its name, it was admitted in evidence without opposition from the defendant. We found it in the record, and we acted upon it as we were bound to do. If it came there improperly, the defendant neglected the means of preventing it, and when they say the decision of the court has taken them by surprise, they forget that they argued the case at length, on the supposition that the title of the plaintiffs might be a donation, and asked us repeatedly to remand the case if we should come to that conclusion. The only thing of which they seem not to have been aware, was, that if the plaintiff's title was a donation, they must have recourse to a direct action to avoid it. The distinction attempted to be drawn between this case and that of *Holmes vs. Patterson*, will not stand the test of examination. After the plaintiff in that case had made out his title, the defendant was bound to make out his also : he could not hold the property unless he did. He claimed by virtue of a sale, and the court maintained him in his possession under a donation. According to the position assumed by the defendant's counsel, that judgment was wrong. It should have been in favor of the plaintiffs, reserving to the defendant his rights under a donation.

That the title of the plaintiff's ancestor was valid, as a donation, under the laws of Spain, we cannot for a moment doubt. It would be valid as such, even now. The authority cited from *Voët*, appears to us conclusive, and no attempt has been made to answer it. It is contended that the clauses which *Febrero* mentions as usual in acts of donation, are not all found in the deed of the plaintiffs. Let it be so, and what results from it ? Simply that the notary may have rendered himself liable to censure, and not that the validity of the act was in any manner affected by the omission. If the defendant's counsel had read on a little further, they would have found, also, the forms and clauses of style, in acts of sale.

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Under the Spanish law, in making donations, no particular form or clause was required; the consent of the parties, the thing given, and the tradition were sufficient. Even verbal sales and donations were permitted, when tradition followed.

A sale without a price, or for a fictitious price, although null as a sale, for want of one of the essential requisites of that contract, is nevertheless valid as a donation, provided tradition follows.

This did not prevent verbal sales, or verbal donations, when tradition followed, from being valid. In donations, particularly, no form or clause was required, under pain of nullity; the consent of the parties; the thing given and the tradition, were sufficient.

French authorities lose much of their weight, when applied to the present case, because they refer to a system of laws under which donations and sales of real estate must be made in writing, and in a particular form, in order to produce any effect; and yet *Pothier*, the greatest of the French commentators, says, that even there, the sale of a valuable estate for a crown, is a donation, because a crown is not a price; and if a crown is not a price, there is necessarily no price at all; and then what becomes of the principle laid down by *Guilhon*, that a deed must be valid in law as a sale, before it can produce any effect as a donation. He has evidently adopted the doctrine of *Paul*, upon which *Voët* comments, without understanding it. Taking without any limitation the words of the author, that a sale without a price, is, as if it never had been made, *pro non facta est*, he has argued that if it is null and has never been made, it can produce no effect even as a donation, and has given us at great length, the benefit of his discovery. But *Voët* expressly tells us, that the text of the Roman laws and the commentary of *Paul* upon them, are not to be thus understood, and lays down the rule, that a sale without a price, or a fictitious sale, although null as a sale for want of one of the essential requisites of that contract, is valid as a donation, provided tradition follows.

We take the opinions of *Voët* and *Pothier*, in preference to that of *Guilhon*, and we are satisfied with the correctness of the decision. The rights which the defendant may have on account of the revocation of the donation, by the subsequent birth of children to the donor, are left open to him, subject to the Spanish laws, which provided that donations might, in such cases, be revoked or reduced when they included all, or the greater part of the estate of the donor.

The rehearing is refused.

CANNON vs. LABARRE.

EASTERN DIST.
April, 1839.APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
DUCHANAN PRESIDING.CANNON
vs.
LABARRE.

The certificate of the recorder of mortgages is *prima facie* evidence of the matters it contains. It devolves on the adverse party to show informalities, or that the renunciations or raising of the mortgages mentioned in the certificate are irregular.

Parole evidence will not be received, to show that on diligent examination of the records of the parish, no act of raising certain mortgages could be found. It is not the best evidence.

In dissolving injunctions, interest can only be allowed on the *amount* of the judgment actually due.

This is an injunction case. The plaintiff in injunction having purchased three arpents of land from the defendant, in February, 1837, for forty-five thousand dollars, one-third of which was paid in cash, leaving thirty-six thousand to be paid by instalments. When twenty-four thousand dollars became due and remained unpaid, the defendant obtained an order of seizure and sale for the whole debt. The plaintiff alleges in support of his injunction against this order, that the defendant has failed to raise several mortgages existing on the property, and to procure his wife's renunciation of her right of mortgage, as stipulated in the act of sale. A general denial was pleaded.

Upon these allegations and issues the cause was tried.

On the trial, the plaintiff offered parole testimony, to show, that after due and diligent examination of the records in the parish judge's office, for the parish of Jefferson, in which the property purchased by him is situated, the witness was unable to find any acts by which it appeared that the mortgages mentioned in the petition were raised, according to the stipulations in the act of sale; or any act showing the renunciation of the defendant's wife; and that this examination was made since the issuing of the order of seizure, &c. The defendant's counsel objected to the introduction of this testimony, which was sustained by the court, on the ground, that

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parole evidence could not be received ; that the only mode of making this proof was by the production of the record, or the certificate of the parish judge or officer keeping the records, &c. The plaintiffs counsel excepted to the opinion of the court.

The defendant produced in evidence the certificate of the parish judge and *ex-officio* recorder of mortgages for the parish of Jefferson, showing that all the mortgages mentioned in the act of sale were raised.

On this evidence, the district judge dissolved the injunction, and gave ten per cent. interest on the entire sum of thirty-six thousand dollars, when there was only twenty-four thousand dollars due, at the time of suing out the order of seizure.

The plaintiff appealed.

Macready, for the appellant.

Labarre and *Derbigny*, *contra*.

Rost, J., delivered the opinion of the court.

The defendant having issued an order of seizure upon a mortgage retained by him, to secure the payment of the price of a tract of land, which he had sold to the plaintiff, the latter obtained an injunction, and asked for a rescission of the sale, on the ground, that the mortgages existing on the property at the time of the purchase, had not been raised by the defendant, in conformity with his stipulations, and were still in force, and that the wife of the defendant in particular had not removed her right of mortgage.

The defendant filed a general denial, and produced in evidence, on the trial of the cause, a certificate of the recorder of mortgages, of the parish in which the property is situated, showing that the wife of the defendant had duly renounced, and that previous to the date of the order of seizure, the mortgages mentioned in the sale to the plaintiff had all been raised, and no others existed upon the property except that of the defendant. Judgment was given in favor of the defendant in the first instance, and the plaintiff appealed.

The certificate of the recorder of mortgages is *prima facie* conclusive against the plaintiff's pretensions. EASTERN DIST.
April, 1839.

If the renunciation of the wife was not in due form, or informalities existed in the raising of the other mortgages, it was his duty to show it. He attempted to introduce a witness to prove, that he the witness, after a due and diligent examination of the records of the parish, could find no act by which the mortgages had been raised, and that the judge, when asked, could not procure the renunciation of the wife. The judge correctly rejected that evidence; it was not the best in the power of the party, or of which the nature of the case admitted.

There is nothing in the exception taken to the opinion of the court, ordering the case to be tried summarily. The trial took place in strict conformity with the Code of Practice.

The judge in dismissing the injunction gave judgment *in solido* against the plaintiff and his surety on the bond, for ten per cent. interest upon the total amount of the mortgage. The plaintiff alleges in this court, that one-third of that sum was not due at the time of the seizure, and that the court erred in allowing interest upon it. The act, further amending the Code of Practice, approved on the 25th of March, 1831, provides, that where an injunction is dissolved, the court, in the same judgment, shall condemn the plaintiff and his surety, jointly and severally, to pay to the defendant interest at the rate of ten per cent. per annum on the amount of the judgment, and no more than twenty per cent. as damages, unless damages to a greater amount be proved. The court does not appear to have allowed any thing on account of damages, and as the order of seizure could only be obtained upon that part of the debt then due, we are of opinion, that interest should not have been allowed upon the whole amount of the mortgage.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended, so as to allow the defendant a judgment against Maurice Cannon and Thomas Barrett, *in solido*, for interest at the rate of ten per

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The certificate of the recorder of mortgages is *prima facie* evidence of the matters it contains. It devolves on the adverse party to show informalities, or that the renunciations or raising of the mortgages contained in the certificate, are irregular.

Parole evidence will not be received to show that on diligent examination of the records of the parish no act raising certain mortgages could be found. It is not the best evidence.

In dissolving injunctions, interest can only be allowed on the amount of the judgment actually due.

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April, 1839.
 GRONING ET AL. twenty-four thousand dollars, instead of thirty-six thousand
 vs. dollars; and that it be otherwise affirmed with costs in the
 KRUMBHAAR. District Court; those of the appeal to be paid by the
 defendant and appellees.

GRONING ET AL. *vs.* W. AND L. KRUMBHAAR.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.

An acceptance for accommodation of the drawers of a bill of exchange, is essentially a credit given to them, and they cannot be made liable to the suit of the acceptors before maturity or payment of the bill.

When the suit or demand is premature, or when the obligation sued on is conditional, and its execution demanded before the condition has been fulfilled, the action must be dismissed.

This is an action on an account current, between the plaintiffs and defendants, for a balance due, according to a statement on the account annexed to the petition.

The account of plaintiffs appears to be made up to the 30th June, 1836, by which they charge the defendants with the amount of their draft in favor of Geo. C. Morton, of Baltimore, and accepted by plaintiffs, for two thousand dollars, payable the 12th and 15th August following.

The present suit was instituted by attachment the 4th August, 1836, before the large draft became due.

The attorney appointed to represent the defendants, pleaded a general denial, and specially denied that the defendants were indebted to the plaintiffs in any sum, at the inception of this suit.

It was shown or admitted, that the bill of exchange or draft, which formed the principal item in the account sued

on, was accepted for the accommodation of the defendants, the drawers thereof. The district judge was of opinion, the liability of the plaintiffs to pay this draft, attached immediately on the acceptance, which was previous to the commencement of suit; and their claim on the defendants also attached at the same moment. Judgment was rendered for the plaintiffs, from which the defendants appealed.

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G. B. Duncan, for the plaintiffs.

Ehryn, for the appellants.

Martin, J., delivered the opinion of the court.

The plaintiffs claim a balance of one thousand nine hundred and thirty-one dollars and eighty-seven cents, on an account in which they credit themselves with the sum of two thousand dollars, the amount of a draft of the defendants drawn on them, payable the 12th and 15th August, 1836. The defendants denied that they were in any manner indebted to the plaintiffs on the 4th of August, 1836, the period of the inception of the suit.

There was judgment for eleven hundred and eighteen dollars and forty-seven cents, in favor of the plaintiffs, and the defendants appealed.

The sole question presented for our solution, is that which relates to the correctness of the opinion of the first judge, which decides that the suit was not premature.

He concluded that the liability of the plaintiffs immediately accrued on their acceptance of the bill, and that as it was drawn for the accommodation of the defendants, the liability of the latter attached immediately.

We are unable to concur in this decision. The circumstance of the bill having been accepted for the accommodation of the drawers, repels the idea that the latter were liable to the suit of the acceptors immediately upon the acceptance. An accommodation is essentially a credit to the person for whom it is made. If the drawer became by the acceptance instantly liable to the acceptor's suit, the acceptance would

An acceptance for accommodation of the drawers of a bill of exchange, is essentially a credit given to them, and they cannot be made liable to the suit of the acceptors before maturity, or payment of the bill.

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not be a favor to him; it being immaterial whether he gave his money to the payee or drawee of the bill. All that the latter can expect, is, that the drawer should place funds in his hands on the last day of grace, or reimburse him the day after; till which, his call on the drawer is premature.

The Code of Practice provides, that when the demand is premature, that is to say, when the action has been brought before the debt had become due, the suit must be dismissed, leaving to the party his right to bring his action in due time, article 158. Further, the acceptor's claim on the drawer is conditional, that is to say, dependent on his payment of the bill. The suit is, therefore, premature, and must be dismissed, if the obligation be conditional, and its execution be demanded before the condition has been fulfilled. *Ibid.*

When the suit or demand is premature, or when the obligation sued on is conditional, and its execution demanded before the condition has been fulfilled, the action must be dismissed.

It is lastly urged, that the defendants, who reside in Philadelphia, have made an assignment of their goods for the benefit of their creditors. As this assignment does not prevent their creditors here from suing them, it does not render their passive debts immediately exigible.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that plaintiff's suit be dismissed, with costs in both courts.

13L 404
47 651

13L 404
105 711
105 712

WILLIAMS vs. BARTON.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE PARISH OF EAST BATON ROUGE, THE JUDGE OF THE EIGHTH PRESIDING.

If the defendant, on the trial, abandons title to the property claimed in the petition, but insists on his claim for damages set up in compensation of the plaintiff's demand, and the latter permits the case to go to the jury in this manner, without objection, the verdict and judgment will not be disturbed on this ground.

Where the defendant gave up the practice of law in New-Orleans, and entered into a contract with the plaintiff, by which he removed to East Baton Rouge, and took upon him the cultivation of an estate and plantation, in conjunction with the plaintiff's son; on a disagreement between the parties, the contract was dissolved, and the plaintiff sued to recover the possession of the estate: *Held*, that the defendant cannot recover damages for the *loss of his practice* in New-Orleans, *as for a breach of the contract*. His absence was not the consequence of a *breach* of the contract by the plaintiff, but of the contract itself.

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Damages for a breach of contract are those which are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract.

No action can be sustained on a breach of promise to make a donation.

This is a petitory action, in which the plaintiff seeks to recover an estate, or tract of land, called the *Arlington estate*, in the parish of East Baton Rouge, together with the slaves, cattle and horses, stock and farming utensils, and the growing crop thereon, which were in the possession of the defendant, and which the plaintiff alleges are illegally and unjustly withheld from him. He also alleges, that he has suffered ten thousand dollars in damages, by reason of the illegal detention of said estate; and he prays judgment, declaring him to be the true owner, and to be put in possession of said property; that it be sequestered, together with the crop, and that he also have judgment for his damages and all costs.

The defendant pleaded a general denial, except as to such allegations as were expressly admitted, and required strict proof of every allegation not admitted.

He expressly averred that he was in possession in virtue of a mutual understanding between the parties; that one half of the plantation and slaves was bestowed as a donation on him and his wife (the daughter of the plaintiff): and he further avers, that if he and his wife are not adjudged to be the owners of one half of said plantation, that then, availing himself of the law allowing demands in reconvention, he expressly states, that before his marriage and removal to Baton Rouge, he exercised the profession of an attorney and

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counsellor at law in the city of New-Orleans, then having a lucrative and still increasing practice ; and that, by the inducements and solicitations of the plaintiff, he was prevailed on to change his residence and remove to the plantation, and, in consequence thereof, he sustained a loss and injury to the amount of ten thousand dollars, which he pleads in compensation against the plaintiff's claim for damages. The defendant sets up further demands for his improvement of the plantation ; for the plaintiff's share of the expenses, and other claims for articles, hands and utensils furnished to a considerable amount, which he prayed might be allowed him.

Upon these pleadings and issues, the cause was tried before the court and a jury.

It appeared in evidence, that the defendant was the son-in-law of the plaintiff, and that the latter was desirous of establishing him and his daughter on a plantation. For this purpose, the plaintiff purchased, in the spring of 1833, a sugar and cotton plantation on the Mississippi river, in the parish of East Baton Rouge, known as the Arlington estate ; and at the instance, and in compliance with several letters written by the plaintiff, the defendant, with his family, removed from New-Orleans about the middle of May, 1833, and established himself in the cultivation of the Arlington estate, in conjunction with the plaintiff, his son residing on the plantation with the defendant.

It was clearly shown, from the plaintiff's letters to the defendant, that the former was to furnish all the hands and supplies for the plantation, and to pay the expenses of the improvements to be put on it. The expense account, however, showed that the business of the plantation was carried on by the co-partnership name of Barton & Williams. This was confined to the cultivation, and, it would appear, to the profits and revenues arising therefrom ; but the plaintiff received the crop of 1833, after paying the expenses. It was also understood, and so the witnesses declare, that one half of the plantation and slaves was considered as belonging to the defendant and his wife, being made as a donation to

them. The witnesses state the declarations of the plaintiff to this effect. It was also shown, that, in February, 1834, the defendant entered into co-partnership with one Wallace, for the cultivation of Arlington plantation that year, of which the plaintiff was apprised, and made no objection.

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In the following summer, a disagreement between the plaintiff and defendant took place, and the latter being in possession, and considering himself as part owner, claimed the right to keep the possession. This suit was instituted the beginning of August, 1834, and the plaintiff had the Arlington estate sequestered, and placed in the custody of the law.

The defendant showed, by the depositions of several gentlemen of the bar in New-Orleans, that when he quit the practice of law and went to Arlington, he was in the enjoyment of a good practice, which was increasing, and that it was worth from ten thousand to twelve thousand dollars per annum. He also made proof of other demands on the plaintiff, growing out of the cultivation of the plantation in partnership between them.

The cause was submitted to a jury, who found a verdict for the defendant, and plaintiff in reconvention, in the sum of ten thousand four hundred and forty-four dollars: whereupon the court rendered the following judgment:

"This cause came on for trial, and was submitted to a jury; on the argument, the defendant abandoned all claim as to the title of the property set forth in the petition, and submitted the case on the issue of damages claimed in compensation and reconvention. The jury entered a verdict in favor of the defendant for the sum of ten thousand four hundred and forty-four dollars; and the court being of opinion that the verdict of the jury is supported by the law and the evidence: it is, therefore, ordered, adjudged and decreed, that the defendant, Seth Barton, do recover from the plaintiff, John C. Williams, the sum of ten thousand four hundred and forty-four dollars: It is, therefore, ordered and adjudged, that John C. Williams be decreed to be the lawful owner of the Arlington plantation, and the property seques-

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April, 1839. be taxed."

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From this judgment the plaintiff appealed; and the defendant, for answer to the petition of appeal, avers there is no error in the judgment, and prays that the same be confirmed.

[This case was argued at great length in written briefs, and orally by the parties on the mass of evidence introduced into the record; but as the case was decided on different principles from those embraced in the arguments, it would be useless to present them *in extenso*, and impossible to give them in a condensed form, so as to embrace the points settled in the case.]

A. N. Ogden and *C. M. Conrad*, for the plaintiff and appellant.

Elam, and *Barton in propria personam*, on the part of the defence.

Eustis, J., delivered the opinion of the court.

The plaintiff instituted this suit against the defendant, for the recovery of a plantation called Arlington, with the negroes, cattle and farming utensils thereto belonging. The defendant, on the trial of the cause, abandoned all pretensions to the title and possession of the property, and confined his claim to a sum of money which he set up in compensation to certain damages which the plaintiff had alleged he had sustained, in consequence of the defendant's acts, to the amount of ten thousand dollars.

The plaintiff offered no evidence in support of damages; the defendant adduced evidence to establish the different sums claimed in compensation, and the jury gave the defendant a verdict against the plaintiff for the sum of ten thousand four hundred and forty-four dollars. Judgment was rendered, giving the estate and negroes to the plaintiff, and confirming the verdict. From this judgment the plaintiff has appealed.

Our attention has been called to the manner and time in which the defendant, during the trial, abandoned his claim to the title of the property in dispute. We think that the party ought to have applied to the court for relief, when the act occurred of which they complain, but as they let the matter go to the jury without objection, and without requiring the charge of the judge in relation to it, this court ought not to interfere in their behalf. We have no reason to believe that an application to the court below, would not have protected them against surprise, and if any detriment has resulted to the cause from the withdrawal of part of the defence by the defendant, it would be unjust in this stage of the proceedings, to subject him to the expense and delay of another trial, for an act in which the plaintiff acquiesced, and the effects of which he could have avoided at the time it occurred.

The controversy between the parties grew out of an understanding between them, for the purchase and cultivation of the estate which was the subject of the plaintiff's demand. The defendant was the son-in-law of the plaintiff, and what passed between them in the inception of this undertaking, was modified by the intimate relations of confidence and friendship, and seems to us to have been dependent on their continuance. The plaintiff was desirous of establishing the defendant on the estate, in partnership with his son. The plaintiff was to furnish the means; no advance was to be required from the defendant, who was to remove from the city, and jointly with the plaintiff's son, conduct the affairs of the plantation. This project did not long succeed, and fifteen months after the defendant took possession of the Arlington Place, this suit was instituted, and the property sequestered.

The only contract which we can notice as having existed between the parties, is a contract on the part of the plaintiff for the use and cultivation of the Arlington plantation, by the defendant and his son, in partnership, for which he, the plaintiff, was to furnish the funds. Supposing that this contract ceased by the interruption of the relations of amity between the parties, (and we feel ourselves unable to come

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If the defendant, on the trial, abandons title to the property claimed in the petition, but insists on his claim for damages set up in compensation of the plaintiff's demand, and the latter permits the case to go to the jury in this manner, without objection, the verdict and judgment will not be disturbed on this ground.

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Where the defendant gave up the practice of law in New-Orleans, and entered into a contract with the plaintiff, by which he removed to East Baton Rouge, and took upon him the cultivation of an estate and plantation in conjunction with the plaintiff's son; on a disagreement between the parties, the contract was dissolved, and the plaintiff sued to recover the possession of the estate: *Held*, that the defendant cannot recover damages for the loss of his practice in New-Orleans, as for a breach of the contract. His absence was not the consequence of a breach of the contract by the plaintiff, but of the contract itself.

Damages for a breach of contract are those which are incidental to, and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract.

to any other conclusion on the subject,) we proceed to examine the claims of the defendant for indemnity.

He claims the sum of ten thousand dollars for the loss of his professional earnings in New-Orleans, during the time he was in Baton Rouge. The defendant was at the bar in this city, and by the contract he was to remove to the Arlington Place. He removed there accordingly, at the instance of the plaintiff, in May, 1833, and so far as relates to this matter, must be considered, as he was in fact, residing there up to the time of the institution of this suit.

His removal from this city, and the loss of his practice at the bar during his absence, was not the consequence of the breach of the contract on the part of the plaintiff, but of the contract itself. By the agreement itself, he was to remove from New-Orleans, and would have equally lost his practice whether the contract was fulfilled or not. The damages which a party can recover on a breach of a contract, are those which are incidental to and caused by the breach; and may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. *Louisiana Code*, 1928.

Ordinairement les parties sont censées n'avoir prévu les dommages et intérêts que le créancier, par l'inexécution d'obligation, pourrait souffrir par rapport à la chose même qui en a été l'objet. Damni et interesse, propter ipsam rem non habitam. Pothier on Obligations, section 161. See, also, 6 Toullier, section 286 et seq., to the same effect.

We leave out of view all that part of the claim of the defendant founded on a promise on the part of the plaintiff to make a donation of one half the estate to his daughter, the wife of the defendant. No action can be sustained on a breach of a promise to make a donation. Up to the time that the donation is executed, under the forms required by our law, the donor is not bound. Indeed, a promise to make a donation to a child, on the part of a father, necessarily presupposes the continuance of those feelings and relations which prompted the promise.

After an examination of the pleadings and evidence in this

case, having great difficulty in coming to a conclusion in relation to the rights of the parties, we suggested to them the propriety of an amicable settlement, of the matters in dispute between them. This suggestion was made from the conviction on our minds, that mutual friends could do more justice between them, than we would be permitted to do, owing to the relations in which they stood to each other, and the modifications with which those relations and the subsequent interruption of them had affected their respective rights. This suggestion was without effect.

Without throwing the responsibility of the breach of the contract on the plaintiff or defendant, and supposing it to have resulted solely from a change of opinion on either side, and a want of harmony, so necessary between parties, in the management of a large estate, we concur with the jury and the court below, in thinking that the defendant is entitled to recover a certain sum from the plaintiff.

Although the partnership between the son of the plaintiff and the defendant, did not continue long, yet we must consider that the latter remained on the estate, under the original agreement.

In the consideration of the defendant's claims, we feel bound to confine ourselves to such charges as the plaintiff is liable for according to the evidence, agreeably to the rules of law, a test which neither anticipated in the commencement of the transactions which are the subject of the present suit, and which we are bound to acknowledge, will not enable us to meet the equity of the case. We allow the defendant the sum of three thousand seven hundred and eighty-five dollars.

The judgment of the court below is, therefore, reversed, so far as relates to the demand in reconvention of the defendant; and judgment is entered in favor of the defendant against the plaintiff, for the sum of three thousand seven hundred and eighty-five dollars, with costs in the court below; and so far as relates to the Arlington estate, negroes and property sequestered, it is affirmed. The appellee to pay the costs of appeal, and the appellant the costs in the

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No action can
be sustained on
a breach of promise to make a
donation.

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April, 1839. sequestration, which are to be paid by the defendant.

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HOWE VS. MANNING'S EXECUTOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF JEFFERSON.

The judge can disregard the testimony of witnesses, if he believes they are not telling the truth, and give judgment as if no evidence had been adduced.

This is an action against the curator of the estate of John F. Manning, deceased, in which the plaintiff claims the sum of four hundred and thirty dollars, for keeping and taking care of the steam-boat *Romeo*, belonging to the estate of the deceased, at the special instance and request of the curator. The account is annexed, and states, that he had charge of the boat from the 6th July to the 30th September, 1837, making in all eighty-six days, at five dollars per day.

The testimony of two witnesses (one a pilot of the steamer *Baton Rouge*) was taken, to show the value of the services. They both stated, that they had seen the boat while in charge of the plaintiff, and that she was leaky and required a pumping and close watching day and night; and that, in rains, she leaked so that it became necessary to overhaul and dry the furniture, &c. The pilot said the services were well worth eight dollars per day, and the other witness stated they were at least worth six dollars.

The judge of probates would not take the statement of the witnesses, but gave judgment allowing three dollars per day, which he said he knew, from his own knowledge, was customary and usual.

The plaintiff appealed.

M^cCarty and Vanmatre, for the plaintiff and appellant.

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M^cKinney, *contra*.

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Rost, J., delivered the opinion of the court.

The plaintiff sues to recover wages at the rate of five dollars per day for services as keeper of a steamer belonging to a succession administered by the defendant.

The defendant does not deny the services, but differs with the plaintiff in relation to their value.

The witnesses examined on the trial stated that the plaintiff's services were worth from six to eight dollars per day; the judge did not believe them, but, knowing that the same services could be obtained from other persons for three dollars per day, gave judgment in favor of the plaintiff at that rate; being dissatisfied, he appealed; and it has been contended for him, in this court, that the judge was bound to allow him five dollars per day, agreeably to the prayer of his petition, because all the witnesses had stated that his services were worth from six to eight dollars.

We have neither the power nor the wish to compel judges to believe the witnesses examined before them in the trial of causes. If, in this instance, the judge knew, of his own knowledge, that the witnesses were not telling the truth, he could not believe them; and the case stood before him as if, no evidence being adduced, he had allowed the plaintiff the usual compensation in such cases, an allowance which he can always make with the consent of the curator.

The reasons which induced the judge of the Probate Court to disregard the testimony of the witnesses, as well as the fact itself that he did disregard it, have great weight with us. We are satisfied that the compensation was ample, and that the plaintiff has no reasonable ground of complaint against the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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LESSEPS VS. ARCHITECT COMPANY.

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VS.
ARCHITECT CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE WATTS
PRESIDING.

Partners in joint stock companies, have no action against the company as such, except for the settlement of accounts and partition, after the association is dissolved.

If the company wrongfully confiscates or withholds the stock of a partner, he has an action to be reinstated in his rights, but his stock will remain subject to the debts and losses of the company, until its dissolution.

This is an action by a partner or stockholder of the Architect Company of the city of New-Orleans, against the Association, to recover the amount paid in, (forty dollars on each share,) on sixty shares of stock, amounting to two thousand four hundred dollars.

The plaintiff alleges, that he is the owner of thirty-five shares, and his wife twenty-five shares, and that said company are in liquidation, and have refused to pay him the amount of his stock and the dividends accruing thereon, but have confiscated them and applied them to their own use. He prays judgment for two thousand four hundred dollars, with his dividends, and interest thereon.

There was no defence, and judgment by default, was confirmed in favor of the plaintiff, and the defendants appealed.

Denis, for the appellants, insisted that the action could not be maintained in the manner set forth. If the plaintiff has been erased from the list of stockholders, he should have sued to be reinstated in all his rights as one; but he cannot sue to recover the amount of his stock and withdraw his capital, without sharing in the losses of the company.

2. The plaintiff cannot maintain an action in his own name for the stock of his wife; so, that on this ground, the suit must be dismissed. *Code of Practice*, 107, 118.

Servant Grangeac, contra.

Rost, J., delivered the opinion of the court.

EASTERN DIST.
April, 1839.

LESSEES
VS.
ARCHITECT CO.

The plaintiff, in his own right, and that of his wife, alleges, that he is the owner of sixty shares of stock of the Architect Company, upon which forty dollars per share have been paid, making together the sum of twenty-four hundred dollars; that the said company, being now in liquidation, has been amicably requested by him to pay said sum, with all dividends accruing thereon, but has refused to do so; that they have illegally confiscated the said shares and dividends, and appropriated them to their own use. He prays judgment for twenty-four hundred dollars, besides dividends and interest.

The defendants having failed to appear, a judgment by default was taken against them, and, after the usual delays, made final, and they appealed.

We are of opinion that they are entitled to relief, and that the judgment of the District Court must be reversed. Partners in a joint stock company have no action against it as such, except one in settlement of accounts and partition, and it can only be brought after the association is dissolved, which is not expressly alleged to be the case in this instance. If the company have wrongfully confiscated the plaintiff's stock, he has an action to compel them to reinstate him in his rights; but those rights are merely those of a partner, and his stock will remain with the rest, subject to the debts and losses of the company until its dissolution and the final settlement of its accounts.

Partners in joint stock companies, have no action against the company as such, except for the settlement of accounts and partition, after the association is dissolved.

Considering, however, that the rights of the parties can be definitely settled, in this suit, by permitting them to amend their pleadings, we think that justice will be furthered by remanding the case.

If the company wrongfully confiscates or withholds the stock of a partner, he has an action to be reinstated in his rights, but his stock will remain subject to the debts and losses of the company, until its dissolution.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; the judgment by default set aside, and the case remanded to the District Court, to be proceeded in according to law, with leave to the defendants to answer, and to both parties to amend; the plaintiff and appellee paying the costs of this appeal.

EASTERN DIST.

April, 1839.MITREAUD

VS.

DELAZZIE.

MITREAUD vs. DELASSIZE.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In an action for damages for slanderous words uttered publicly by the defendant, concerning the plaintiff, the latter may amend his petition by adding allegations of the *falsity* of the charges, and *malice* on the part of the defendant in making them; but he must pay all costs up to the time of the amendment.

This is an action of slander, in which the plaintiff alleges that the defendant, on a certain day and in several places, publicly uttered against him many slanderous words and epithets, which he sets forth in the petition, as injurious to his reputation, and to his damage five thousand dollars. He prays that the defendant be cited and condemned to pay said damages, together with costs, etc.

The defendant excepted to the petition, as setting forth no legal cause of action, and prayed to be dispensed from answering, and that the suit be dismissed.

The plaintiff filed a supplemental petition, in which he alleges that the slanderous words spoken by the defendant, of and concerning him, the plaintiff, as set forth in the original petition, were and are false, scandalous, defamatory and malicious, and were intended by the defendant to injure, defame and disparage his good name, honest reputation and character, which he has hitherto sustained and enjoyed, etc. He concludes with alleging the injury he has sustained, and renews his prayer for the damages demanded in his original petition. The defendant's counsel excepted to receiving the amended petition, because the original one set forth no legal cause of action, and was excepted to on this ground, which the plaintiff is not permitted to defeat by an amendment, when his original petition is so defective that no judgment in his favor could be rendered on it. He prays that the supplemental petition be rejected, and the suit dismissed with costs.

This exception was sustained by the court, and the plaintiff's suit dismissed, and he appealed.

Mace, for the plaintiff and appellant. This suit should not have been dismissed, because the petition virtually charged the defendant with malice. *2d Starkie on Evidence*, 861; *marginal note, evidence of malice; and same page, note (y.)*

EASTERN DIST.
April, 1839.

MITREAUD
VS.
DELAZZIER.

2. This is a civil action for damages, which requires no peculiar form in the petition. *Code of Practice, articles 160-1.*

3. The plaintiff's supplemental petition is in the nature of an amendment to the original petition, without altering the substance of his demand; he was, therefore, entitled to the amendment. *Code of Practice, 419.*

Roselius, contra.

Eustis, J., delivered the opinion of the court.

The plaintiff applied to the court below for leave to amend his original petition, by filing a supplemental petition; the judge refused to allow the amendment, and the plaintiff's petition having been dismissed, the correctness of this decision is brought before us for our decision, on an appeal.

This is an action for damages for slanderous words uttered publicly by the defendant, concerning the plaintiff. The amended petition contained allegations of the falsity of the charges of which the plaintiff complained, and of malice on the part of the defendant in making them, which allegations were omitted in the original petition.

The article 419 of the Code of Practice, allows amendments, under the leave of the court, *even after issue joined*, "provided the amendment does not alter the substance of the demand, by making it different from the one originally brought."

The amendment sought to be made in this case, certainly did not alter the substance of the demand; the allegations of falsity and malice, are necessarily implied in the claim for damages.

We think the judge ought to have allowed the amendment to be made, but that the plaintiff ought to be amerced in the costs incurred up to the time of making it.

EASTERN DIST.
April, 1839.

HOFFMANN
VS.
HOLLAND.

It is, therefore, ordered, that the judgment of the Parish Court be reversed, and that the cause be remanded for further proceedings, with directions to the judge to allow the supplemental petition of the plaintiff to be filed on his paying the costs incurred in this case, up to the time of the presentment of the supplemental petition, and that the defendant and appellee, pay the costs of the appeal.

HOFFMAN VS. HOLLAND.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The acknowledgment of the father to pay the note of his son was indirect, and failed to satisfy the district judge of his liability, and this court did not feel authorized to disturb the judgment.

This is an action against the father, on the promissory note of the son, for blacksmith's work done for the benefit of the father's livery stable.

There was a general denial and want of amicable demand pleaded. The plaintiff's witness states that he called on the father and son for payment; that the father, after several evasive answers, *said he supposed he was responsible*, and would go the next morning and see the plaintiff, and settle the note with him. The district judge deemed this evidence insufficient to charge the father with the amount of the son's note, and gave judgment for the defendant.

The plaintiff appealed.

Greiner, for the plaintiff.

Elwyn, *contra*.

Eustis, J., delivered the opinion of the court.

EASTERN DIST.

April, 1839.

WILLIAMS
vs.
ROBINSON.

This is a suit for the recovery of the amount of a promissory note given by the defendant's son, as is alleged, for work done in repairing carriages, and other blacksmith's work in the livery stable of the defendant. The evidence shows, that the livery stable was kept by the son, and the liability of the defendant rests solely on an acknowledgment of the debt, which, it is charged, is binding on him. This acknowledgment is testified to by the attorney for the plaintiff; and as the judge of the court below did not consider it sufficiently positive and free from uncertainty to establish the liability of the defendant, we do not feel ourselves authorized to disturb his decision.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

WILLIAMS vs. ROBINSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The obligation of the drawer of a bill is fixed by the non-acceptance, protest and notice; and it is immaterial whether any demand and protest for non-payment was made or not.

A subsequent promise to pay a bill or note, or a part payment thereof, must be made with a full knowledge of the fact of a want of due diligence on the part of the holder, in giving notice of protest to the parties in order to be binding; but affirmative proof of this knowledge is not required. It may be inferred from circumstances.

This is an action by the payee and holder of a bill of exchange, drawn by C. Robinson and J. M'Murdo, under

EASTERN DIST.
April, 1839.

WILLIAMS
vs.
ROBINSON.

the firm of Robinson & Co. at ten days sight, on Messrs. Lancaster, Denby & Co. of Richmond, Virginia, dated the 28th of March, 1837, for the sum of six hundred and forty-one dollars twenty-two cents.

The suit was discontinued as to M'Murdo, and Robinson pleaded a general denial.

Osborn Abbott being sworn, says, he presented the bill sued on to C. Robinson, one of the drawers, for payment, who desired witness to call again; he did so, and Robinson said it was a *third of exchange*, and if he had examined he would not have paid what he did on it. He looked at the credit on the back of it, said nothing. He also observed, that when this bill was given it was to be paid at Richmond.

It seems, this bill was never presented to the drawees for acceptance, and that the *first* and *second* of the bill never was accounted for, and the evidence was objected to on this ground.

The evidence shows, that the defendant paid upwards of one hundred dollars on the bill before he declined payment altogether.

On this evidence, there was judgment for the plaintiff for the balance due, and the defendant appealed.

Elmore and King, for the plaintiff.

T. N. Peirce, contra.

Eustis, J., delivered the opinion of the court.

This is an action against the drawer of a bill of exchange, as is alleged, protested for non-acceptance. There is no proof of any presentment to the drawee, of protest, or of any notice to the drawer. The bill was drawn on the 28th of March, 1837, and it appears that a partial payment was made on it by the drawer, in February, 1838. A witness stated that he presented the bill to the drawer and demanded payment. The drawer requested him to call again, and he would give him an answer more fully. On his return, the defendant said it was a third of exchange, and if he had

examined it, he would not have paid what he did on it. This took place on the 17th March, 1838. The defendant added, that at the time the bill was given, it was agreed that it should be paid in Richmond, the place in which the bill was drawn. From these facts, it would be left to a jury to infer whether the partial payment was, or not, made with a knowledge on the part of the drawer, of the want of demand, protest and notice. The knowledge may be inferred, from the circumstances attending the payment. The reason for the drawer refusing to pay the balance due on the bill, is placed on grounds entirely independent of his knowledge of the state of facts which would exonerate him.

There is no allegation in the petition, of any demand for the payment of the bill, or of any protest and notice of the non-payment. The obligation, however, of the drawer, is fixed by the non-acceptance, protest and notice, and it is immaterial whether any demand and protest for non-payment, was made or not. 5 *Johnson's Reports*, page 385. 4 *Johnson's Reports*, 144.

We consider the law as settled, that a subsequent promise to pay a bill or note, or a part payment thereof, must be made with full knowledge of the facts of a want of due diligence on the part of the holder, but that affirmative proof of the knowledge is not required. It may be inferred from the promise, or payment under the attending circumstances. 3 *Kent's Commentaries*, 113. 12 *Massachusetts Reports*, 52. 12 *Wheaton's Reports*, 187. 1 *Taunton's Reports*, 12.

Under this principle, the judge of the court below appears to have decided the case, and we affirm his judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.
April, 1839.

WILLIAMS
vs.
ROBINSON.

The obligation of the drawer of a bill is fixed by the non-acceptance, protest and notice, and it is immaterial whether any demand and protest for non-payment was made or not.

A subsequent promise to pay a bill or note, or a part payment thereof, must be made with a full knowledge of the fact of a want of due diligence on the part of the holder, in giving notice of protest to the parties in order to be binding; but affirmative proof of this knowledge is not required. It may be inferred from circumstances.

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April, 1839.

HOBSON AND CO.

VS.

WHITTEMORE

ET AL.

HOBSON AND CO. VS. WHITTEMORE ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Wherever the same fact is the ground of a dilatory exception, and also of the merits of the action, it must be acted on in the trial of the cause, otherwise the fact would be tried summarily, and could not be submitted to a jury.

Commercial partners may all be sued in the parish in which they conduct their business, although one of them resides and is domiciled in a different parish.

The plaintiffs allege, that the commercial firm of Whittemore, Blair & Co., of New-Orleans, composed of the said Whittemore and Daniel Blair, residing in New-Orleans, and of A. F. Rightor, who resides at Donaldsonville, in the parish of Ascension, are indebted to them in the sum of forty-three thousand eight hundred and sixty-nine dollars, with ten per cent. interest thereon, for the balance of an account, which is annexed to the petition, it being for advances in cash, and endorsements on notes and bills drawn by said firm. They pray judgment *in solido* against the defendants.

The defendant Rightor pleaded his domicile; that he was a resident of the parish of Ascension, and could not be sued in New-Orleans: he also denies that he is a partner of Whittemore & Blair, or ever was, and that no judgment can be rendered against him as such. On the merits, he pleaded the general issue.

The *firm* pleaded to the merits, and averred that they were not indebted in the sum claimed; that they were entitled to many credits which have not been allowed them, and which they plead in compensation, &c.

The plaintiffs established their claim by proof, and showed that the defendants were partners, and had judgment. The defendants appealed.

Benjamin, for the plaintiff, insisted on the affirmance of the judgment.

Preston, for defendants, assigned for error, among other matters, that the exception of domicile was a declinatory plea, and was never overruled. It was manifestly erroneous to try the cause on its merits before this exception was first disposed of. It should have been placed on the exception docket, and tried summarily, and not on the ordinary one, and tried with the cause on its merits. This plea could only be decided on, by trying whether Rightor was a partner or not. The Parish Court of New-Orleans was incompetent to try this question, because its jurisdiction is confined to causes of action arising in the parish or first judicial district. Rightor lived out of the district.

EASTERN DIST.
April, 1859.
HOBSON AND CO.
VS.
WHITTEMORE
ET AL.

Martin, J., delivered the opinion of the court.

The appellant has built his hopes for the reversal of the judgment on the following assignment of errors, apparent on the face of the record :

1. That his plea to the jurisdiction of the court, on account of his residence out of the parish, was not overruled before the trial of the cause.

2. The Parish Court was incompetent to try the question whether the appellant was a partner, because it was denied, and it was admitted that he resided in another parish.

3. The suit should have been tried by a jury.

I. The appellant was sued as a partner of a commercial house established in New-Orleans. In order to ascertain whether he was sueable in the Parish Court, it was necessary to establish that he was a partner ; in other words, to prove one of the allegations in the petition on which the plaintiff's claim rested, and which the defendant denied. Whenever the same fact is the ground of a dilatory exception, and of the merits of the case, it must be acted on in the trial of the cause ; because, otherwise, the fact would necessarily be tried summarily, and could not be submitted to a jury.

Whenever the same fact is the ground of a dilatory exception, and also of the merits of the action, it must be acted on in the trial of the cause, otherwise the fact would be tried summarily, and could not be submitted to a jury.

II. The appellee's counsel has correctly urged, that if the second error assigned could prevail, a partner residing out of the parish in which the firm is established could never be a jury.

EASTERN DIST.
April, 1839.

SOEY'S HEIRS
vs.

SOEY'S CURATOR.

Commercial partners may all be sued in the parish in which they conduct their business, although one of them resides and is domiciliated in a different parish.

sued in that parish, under the Code of Practice, art. 165, as it would be sufficient for him to allege his residence out of the parish in order to disable the court to act on his liability as a partner.

III. The defendants filed separate answers, and the appellant did not pray for a jury; the exception, therefore, was properly heard with the merits.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

SOEY'S HEIRS vs. SOEY'S CURATOR.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF NEW-ORLEANS.

The sickness of a witness not summoned, and the absence of the attorney, trying a suit in another court, are no grounds for a continuance, or for a new trial.

The defendant, J. W. Collins, curator of the estate of John Soey, deceased, filed his account and tableau of distribution in the Court of Probates.

The plaintiff, John M'Mullin, tutor of the minors Soey, made opposition to the account on several grounds, and required the curator to file his vouchers, and prove every item in it not admitted.

The cause was fixed for trial, and the defendant notified thereof. On the day fixed he came into court, and stated, that his only and material witness was sick, and that his sole counsel was unavoidably absent, trying a cause in the District Court.

The judge of probates, deeming this statement insufficient

to operate a continuance of the cause, proceeded with the trial *ex parte*. EASTERN DIST.
April, 1839.

There being no evidence or vouchers offered in support of the curator's account, the opposition was sustained and judgment rendered in conformity to it. The defendant's counsel moved for a new trial, principally on the grounds of the absence of his witness and counsel. The defendant made oath to the facts and grounds on which he relied for a new trial. It appeared, however, that his witness had not been summoned. SOEY'S HEIRS
VS.
SOEY'S CURATOR.

The judge overruled the motion, considering these grounds, viz., sickness and absence of a witness not summoned, and also the absence of the party's attorney, who was at the time trying a suit in the District Court, insufficient for a continuance, and could not serve as such for a new trial.

The defendant appealed.

I. W. Smith, for the plaintiff, in opposition.

Roselius, for the appellant.

Eustis, J., delivered the opinion of the court.

The plaintiff, tutor of the minors Soey, filed an opposition to the account rendered by the defendant in the Court of Probates, and on the trial of the opposition, no evidence having been offered by him in support of the charges made by him against the succession, the opposition was sustained, and judgment was rendered for the balance of funds in his hands. From this judgment, after an unsuccessful motion for a new trial, the defendant has appealed.

We have examined the grounds on which a new trial was asked. The judge, acting on the application, exercised his discretionary power, and, on referring to his reasons for refusing it, we are satisfied that he acted correctly.

The judgment is therefore affirmed, with costs.

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April, 1839.

**DARRAMON
vs.
FOLLIN ET AL.****DARRAMON vs. FOLLIN ET AL.****APPEAL FROM THE FARMER COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.**

There being no grounds on which to support the appeal, judgment is affirmed, with damages, as for a frivolous appeal.

This is an action on an attachment bond. The defendants pleaded a general denial, and set up several matters in defence, most of which went to the irregularity of the attachment in the first instance.

Judgment was rendered on the bond for three hundred and four dollars, with legal interest and costs. The defendant, Follin, alone appealed.

Roselius, for the plaintiffs, prayed for the affirmance of the judgment, with damages and costs.

D. Seghers, contra.

Eustis, J., delivered the opinion of the court.

This is an action on an attachment bond signed by the defendants; judgment was rendered against them, and Follin, one of the defendants, has appealed. We see no ground on which the appellant could reasonably have expected a reversal of the judgment, and as the plaintiffs have claimed damages for a frivolous appeal, we feel bound to allow them.

The judgment of the District Court, is, therefore, affirmed, with five per cent. damages, and costs in both courts.

BOGART ET AL. *vs.* DRAKE ET AL.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS, JUDGE DUNCAN
PRESIDING.

Judgment affirmed; and although the appeal was frivolous, as no damages
were prayed for, none were allowed.

This is an action against the makers of a promissory note,
and the defence is a general denial. There was judgment,
and the defendants appealed.

Guyol and T. Slidell, for the plaintiffs.

Clarke, contra.

Rost, J.—This is an action upon a promissory note; the
note was proved, and no serious defence being made, judg-
ment was given in favor of the plaintiffs. This appeal seems
to have been taken for delay, but the plaintiff has not asked
for damages.

It is, therefore, ordered, adjudged and decreed, that the
judgment of the City Court be affirmed, with costs.

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April, 1839.

BOGART ET AL.
vs.
DRAKE ET AL.

YARD AND BLOIS'
SYNDIC
vs.
SRODES.

YARD AND BLOIS'S SYNDIC *vs.* SRODES.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The case was remanded for the defendant to prove offsets to the note sued
on, and no further evidence being offered, judgment was properly given
for the entire amount.

This is an action on a promissory note. The case has

EASTERN DIST.

April, 1839.

M'COY'S EX'RS.

VS.

PRITCHARD ET AL

been before this court, and was remanded to allow the defendant to prove any payments or offsets he might have against it in the hands of the transferors. See 9 *Louisiana Reports*, 479.

On the return of the case, no further evidence being offered, judgment was rendered for the entire amount of the note sued on, and the defendant again appealed.

Lockett, for the plaintiff.

J. Slidell, for the appellant.

Eustis, J., delivered the opinion of the court.

This cause was remanded to the court below, at a previous term of this court, for the purpose of enabling the defendant to establish any offsets he may have had to the note sued on by the plaintiffs. As no further evidence was offered on the trial of the cause, the judge gave judgment for the whole amount of the note. In this judgment we concur.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

M'COY'S EXECUTORS *vs.* PRITCHARD ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE BUCHANAN PRESIDING.

According to the 907th article of the Code of Practice, the Supreme Court is empowered to condemn the appellant to pay damages for a frivolous appeal, if the appellee claims it; but these damages cannot exceed ten per cent. on the amount in dispute, including interest.

So, where the judgment bears five per cent. interest, the damages cannot exceed five per cent.

This is an action on a promissory note against the maker and endorsers, and judgment *in solido* against all of the defendants is prayed for.

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April, 1839.

The defence, after pleading some exceptions, which were overruled, was a general denial.

M'COT'S EX'RS.
VS.
FRITCHARD ET AL

The plaintiffs proved their demand, and had judgment, with five per cent. interest thereon, and the defendants appealed.

Grymes, for the plaintiff.

G. B. Duncan, for the appellants.

Rost, J., delivered the opinion of the court.

This is an action upon a promissory note, duly protested for non-payment. Judgment was given for the plaintiff in the court below, and the defendant has appealed. The defence was not serious, and the appeal was evidently taken for delay. The plaintiff has prayed for damages, and is entitled to them: by article 907 of the Code of Practice, this court is empowered to condemn the appellant on a frivolous appeal, to pay to the appellee, if the latter claims it by his answer, such damages as it may think equivalent to the loss which he has sustained, by the delay consequent on the appeal, provided the amount of such damages shall not exceed ten per cent. on the value of the amount in dispute. We are of opinion, that, under this provision, the plaintiff can receive no more than ten per cent. upon the sum due him. That rate of interest being the highest which our law sanctions for the use of money, the damage caused by the loss of that use cannot exceed it; and, as the note sued on bears interest at the rate of five per cent. from the day of the protest till paid, we can only allow five per cent. more upon its amount.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with five per cent. damages on the amount of the note, and costs in both courts.

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M'COY'S EX'RS.

VS.

FRITCHARD ET AL

been before this court, and was

defendant to prove any payment

against it in the hands of

Reports, 479.

On the return of

offered, judgment

note sued on, and

*Lockett, f**J. St**F*

REAL CASES IN APRIL.

*These cases have all been decided on the principles
of the case of M'Coys Executors vs. Pritchard et
al. which settles the maximum of damages in cases
of similar appeals.*

M'COY'S EXECUTORS VS. J. D. BEIN ET AL.

SAME VS. R. BEIN ET AL.

ERWIN VS. RILLIEUX ET AL.

CAMPBELL AND HATCH VS. MORRISON ET AL.

LAMBERT VS. BACH.

LOCKE VS. JOHNSON.

LEGOASTER VS. RILLIEUX.

BRIDGE AND CO. VS. CHEVALIER.

BARNET VS. RAINEY.

BLACKWELL VS. THORN.

HOLLAND VS. JENKINS.

BERNARD DE SANTOS VS. RUDDOCK. (TWO CASES.)

MERCHANTS' BANK VS. MURPHY ET AL.

MAHER VS. ADAMS ET AL.

OF THE STATE OF LOUISIANA.

431

LALANNE'S HEIRS *vs.* MOREAU.

EASTERN DIST.

May, 1839.

THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

LALANNE'S HEIRS
vs.
MOREAU.

...ary that the appointment of appraisers should form a part of
...e, ordering the sale of property inherited by minors, to pay the
...s of the succession; or, that their names be mentioned in the order.
Their appointment may be entered, afterwards, on the minutes of the
court. When the substantial requisites of the law are complied with, it
will suffice.

Where there is a formal decree of the Court of Probates, recognizing the
necessity of selling property inherited by minors, for the payment of the
debts of the succession, giving an opportunity to the attorney of absent
heirs to show, that, in fact, no such necessity existed, the purchaser is not
bound to look beyond this.

No alienations of minor's property can take place, without the advice and
consent of a family meeting, and upon sufficient cause shown.

The decree of the Court of Probates upon the recommendation of a family
meeting, for the sale of property inherited by minors, to pay the debts of
the ancestor, is so purely *in rem*, and against the property, independently
of the persons, that the sale made under it extinguishes all the mortgages,
existing in the name of the owner on the property.

Sales directed by the Court of Probates, are judicial sales to all intents and
purposes, and the purchaser is protected by the decree ordering them.

It is settled in most of the states of the union, that a purchaser under a
decree of the Orphan's Court, is bound to look to the jurisdiction; but
that the truth of the record, concerning matters within that jurisdiction,
cannot be disputed. If the facts necessary to give the court jurisdiction,
appear on the face of the proceedings, the purchaser need not look beyond
the decree.

This is a petitory action, in which the plaintiffs allege that
they are the sole heirs of their late mother, Louise Boune
Lalanne, f. w. c., and inherited from her a house and lot,
situated in the faubourg Marigny, and now in the possession
and claimed by the defendant, as owner. The defendant
sets up title to the premises, in virtue of a probate sale, made
in pursuance of the advice of a family meeting and decree of

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47 106	
47 890	
13 431	
115 424	
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119 703	
13 431	
122 898	
13 431	
125 508	

EASTERN DIST. the Probate Court thereon, to pay the debts of the succession
May, 1839. of the deceased ancestor.

LALANNE'S HEIRS The plaintiffs endeavor to show several vices of nullity, in
vs. the proceedings by which the property was sold, and pray
MORREAU. that the sale be annulled, and the property decreed to them,
 as the true and lawful owners.

The cause was submitted to a jury, who returned a verdict for the plaintiffs for two-fifths of the house and lot; and from judgment rendered thereon, the defendant appealed.

Roselius and Elwyn, for the plaintiffs.

D. Seghers and Canon, for the defendant.

Rost, J., delivered the opinion of the court.

The petitioners allege that they are the children and only heirs of Louise Boune Lalanne, who departed this life in May, 1816, and who was at the time of her death the owner of a town lot, now in possession of the defendant. That they were both minors when their mother died, and have never been legally divested of their title to said lot. They pray judgment against the defendant, and that he be made to pay them damages, at the rate of twenty dollars per month, during the whole time of his possession. The plaintiffs subsequently filed a supplementary petition, showing that one undivided half of the lot in controversy, belonged to a succession, which the defendant was administering as executor, and prayed that the said defendant might be cited in that capacity. It being subsequently stated to the court, that another heir of B. Lalanne existed, and was a minor, a curator, *ad hoc*, was appointed to represent him, and the said curator intervened.

The defendant, in his own right, and as executor, denied the heirship of the plaintiffs; set up title by purchase, from the syndics of Theodore Bauduc, on the 2d of December, 1830, and stated that the syndics had since been discharged, but that certain creditors of the insolvent, whom he named, had received the price paid by him for the lot, by virtue of a

special mortgage which they held upon it. He prayed that the said mortgage creditors might be cited in warranty, and in case of eviction, that they might be compelled to refund to him the price paid.

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The warrantors denied the heirship of the plaintiffs, and all the allegations of the petition and supplemental petition, and of the call in warranty. They further denied having received the proceeds of the sale of the lot, the larger part thereof having been applied to the payment of the privileged debts of the insolvent. The case was submitted to a jury, who gave a verdict in favor of the plaintiffs for two-sevenths of the property claimed, and after an unsuccessful attempt on the part of the defendant to have said verdict set aside, judgment was rendered in conformity therewith, and the defendant appealed.

The plaintiffs rest their case upon the following informalities, alleged to exist in the administration of their mother's succession :

1st. That the family meeting who advised the sale, was assembled without giving three days previous notice to the members of it.

2d. That the under tutor and curator, *ad lites*, did not take the oath required by law, till eleven days after the deliberations of the family meeting.

3d. That the order to sell, and the sale, were made before any surety had been given by the tutor and curator.

4th. That no person was specially named and appointed by the court, to appraise the property.

The opinion which we have formed, makes it necessary that the last informality alleged by the plaintiffs, should be first noticed : an order was made by the court, that appraisers should be appointed, but their names were left in blank, before the sale. However, B. Montreuil and Landon, were sworn in open court as appraisers, and it is stated in the affidavit, that they had been appointed by the court to act as such. They made the appraisal in presence of the register of wills, and in due form of law ; and the oath, as well as the appraisal, are of record in the Probate Court.

It is not necessary that the appointment of appraisers should form a part of the decree, ordering the sale of property inherited by minors, to pay the debts of the succession, or that their names be men-

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tioned in the order. Their appointment may be entered afterwards on the minutes of the court. When the substantial requisites of the law are complied with, it will suffice.

When there is a formal decree of the Court of Probates, recognizing the necessity of selling property inherited by minors, for the payment of the debts of the succession, giving an opportunity to the attorney of absent heirs, to show, that in fact, no such necessity existed, the purchaser is not bound to look beyond this.

Under these circumstances, all the substantial requisites of the law have been complied with, and the fact that the names of the appraisers were left in blank, in the order of the judge, is a mere clerical omission which could be supplied, *nunc pro tunc*, at any subsequent time, and which we feel ourselves authorized to supply even now; it was not necessary that the appointment of appraisers should form a part of the decree ordering the sale; it might have been ordered afterwards on the minutes of the court.

The other informalities alleged, are all anterior to the decree of the court ordering the sale to take place, and with respect to them, so far as the purchaser is concerned, this case is not to be distinguished from that of *Michel's Heirs vs. Michel's Curator and others*; 11 *Louisiana Reports*, 149. In that case the court said: "We have a formal decree of the Court of Probates, recognizing the necessity of the sale for the payment of the debts, and preceded by an opportunity on the part of the attorney for absent heirs, to show that, in fact, no such necessity existed. The purchaser is not bound, in our opinion, to look beyond this."

In the present instance, the necessity of the sale was recognized by the family meeting, and it appearing in evidence before them, that there were debts or charges of the succession unsettled, they advised that the lot in controversy should be sold, and that one-third of the proceeds of the sale should be for cash, in order to pay them. The under tutor ratified all the proceedings of the family meeting, by joining with the tutor and curator, *ad bona*, in a petition to the court, praying that, whereas they both deemed the sale of indispensable necessity, the same might be ordered to take place in conformity with the advice of the family meeting. The court made the decree, as prayed for, and the sale under which the defendant claims, took place. We are of opinion, that in this case, as in that of *Michel's Heirs*, this decree had the force and effect of a judgment, beyond which the purchaser is not bound to look.

Whatever might have been the effect of the authorization of the judge, under the former laws of the country, the radi-

cal changes made in these laws by subsequent legislation, fully justify the conclusion to which we have come. Under the jurisprudence of Spain, the act of the judge in cases of this kind, was a mere authorization given to the tutor to sell the minor's property, upon an *ex parte* statement, made by him, and taken for true. A *contestatio litis*, as to the propriety or necessity of selling, could never arise. The tutor appeared alone before the judge, and when the authorization prayed for was granted, no one had capacity to appeal from it, however injurious it might be to the minors. Under such a state of things, it may have been wise to provide, that the minor should have four years, after he had attained the age of majority, to contest sales of his property, made to his prejudice during his minority, with or without the authorization of the judge; but our legislative enactments, in giving greater security to minors, that their property shall not be alienated without necessity, have also given greater force to the decrees of courts, under the faith of which third persons acquire it, when it is sold, and have virtually repealed the former laws.

Family meetings were first introduced by the code of 1808, and since that time no alienation of minor's property can take place without their advice, and upon sufficient cause shown. Under tutors, also, have since been appointed in all cases of tutorship, and it is made their duty to attend the deliberations of family meetings whenever they are convoked for that purpose, and to approve or disapprove their proceedings. When the under tutor disapproves the advice to sell, given by the family meeting, a *contestatio litis* arises between him and the tutor; and the court, after hearing them, decides whether the sale is necessary, and adjudicates upon all matters at issue between them. If either party is dissatisfied with the judgment, he is entitled to an appeal, as in all other civil cases. Upon that appeal, the merits of the opposition are again examined, and the decision of the appellate court is final upon the controversy. When it is given in favor of the tutor, it is no longer a simple *ex parte* authorization to him to sell; it is a final judgment *in rem*,

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No alienations of minor's property can take place without the advice and consent of a family meeting, and upon sufficient cause shown.

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The decree of the Court of Probates upon the recommendation of a family meeting for the sale of property inherited by minors to pay the debts of the ancestor, is so purely *in rem* and against the property independently of the persons, that the sale made under it extinguishes all the mortgages existing in the name of the owner on the property.

Sales directed by the Court of Probates are judicial sales to all intents and purposes, and the purchaser is protected by the decree ordering them.

which condemns the property to be sold, and if, after its rendition, it became the interest of the tutor not to sell, and he failed to do so, the under tutor would have the right to require from him the specific performance of the decree.

The decree of the Court of Probates, in such cases, is so purely *in rem*, and against the property, independently of the person, that the sale made under it extinguishes all the mortgages existing in the name of the owner on the property sold.

It matters not, as was well said by this court, in the case of Michel's Heirs, "whether the attorney of absent heirs, or in this case, the under tutor, made any formal opposition. When the necessity of the sale was manifest to him, it would have been doing a vain thing, and perhaps, prejudicial to the estate." The force and effect of a decree, cannot be affected by the manner in which the suit was conducted by the parties litigant. In this case, also, there were debts or charges to pay, and it might be said that there was, properly speaking, no property belonging to the minors, until they were satisfied. But we place our decision on the broad ground, that sales directed or authorized by Courts of Probates, are judicial sales to all legal intents and purposes. It was so decided by this court in the case already alluded to, and the principle is recognized in that of *Pintard vs. Deyris*, 3 *Martin*, N. S., 32. Article 114, page 366, of the old Civil Code, also seems to recognize it, and it is a textual provision of the Louisiana Code, included in article 1863.

The necessity and wisdom of such a rule of property, has long been felt and acknowledged in the most important states of this Union, and none is better settled by the decisions of their courts. They all maintain, that a purchaser under a decree of the Orphans Court, is bound to look to the jurisdiction, but that the truth of the record concerning matters within that jurisdiction, cannot be disputed. That the decree of the court is to be received as conclusive evidence, not to be impeached from within, and like all other acts of the highest judicial authority, impeachable only from without; and that a judgment, decree, sentence, or order, passed

by a competent jurisdiction, which creates or changes a title, or any interest in an estate, is not only final as to the parties themselves, and all claiming under them, but furnishes conclusive evidence to all mankind, that the right or interest belongs to the party to whom the court adjudged it. See *McPherson vs. Conliff and others*, 11 *Sergeant and Rawle*, 434. *Hackett and Wife vs. Philips*, 2d *Sergeant and Rawle*, 7. *Commonwealth vs. Greenwood Turnpike Company*, 1 *Connecticut Reports*, 17.

The Supreme Court of the United States came to the same conclusion, in the case of *Thompson vs. Tolmie*, 2d *Peters*, 166. This was an action instituted on account of some alleged informalities in a sale of minor's property, made by order of court. The Supreme Court said: "These proceedings were brought before the court below, collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered as judicial proceedings: they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well settled rule of law, in such cases, is, that when the proceedings are collaterally drawn into question, and it appears upon the face of them, that the subject matter was within the jurisdiction of the court, they are voidable only; the errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set them aside, or in an appellate court." The same high authority added in conclusion, that "if purchasers were responsible for the mistakes of the court, in point of fact, after they had adjudicated upon the facts and acted upon them, such sales would be snares for honest men."

These opinions are so consonant with justice and sound morality, that, in case of doubt, we would not hesitate to adopt them; but we are satisfied that our own laws, do not authorize a different conclusion.

Considering that the decree of the Court of Probates, ordering the sale of the lot in controversy, was a judgment rendered by a competent court, beyond which the defendant

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It is settled in most of the states of the Union, that a purchaser under a decree of the Orphans Court, is bound to look to the jurisdiction; but that the truth of the record concerning matters within that jurisdiction, cannot be disputed. If the facts necessary to give the court jurisdiction, appear on the face of the proceedings, the purchaser need not look beyond the decree.

EASTERN DIST. is not bound to trace his title, and considering, further, that
May, 1899. no material informality has been shown in the proceedings
VIGERS ET AL. which followed the said decree, we are of opinion that the
vs. judgment of the District Court must be reversed, and the
KILSHAW. defendant maintained in his possession.

It is, therefore, ordered and adjudged, that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the defendant, with costs in both courts.

VIGERS ET AL. vs. KILSHAW.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.**

Where an agent, with general and special powers, is instructed to purchase three hundred hogsheads of tobacco for the London market, and, without additional authority, he ships ninety-nine hogsheads to New-York, on which a loss is sustained, he is answerable therefor.

So, where an agent acts in good faith, but indiscreetly, and exceeds his instructions, he will be responsible to his principal for the loss that results.

This is an action by the principal against his agent, to recover three thousand four hundred and three dollars, for losses on ninety-nine hogsheads of tobacco, purchased by the latter on account of the former, without authority, and shipped to New-York, where it was sold at a loss.

The defendant pleaded a general denial, and averred that the tobacco in question was purchased by the confidential broker of the plaintiff, at his instance, and with his advice. He further states, that he acted in good faith, and to the best

of his knowledge, for the plaintiff's interests, while acting as his agent. He prays that the suit be dismissed.

The evidence showed that the defendant exceeded his instructions in making the purchase in question.

The cause was submitted to a jury, who returned a verdict for the plaintiff, allowing him the sum he claimed. From judgment rendered thereon, the defendant appealed.

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VIGERS ET AL.
VS.
KILSHAW.

Lockett, for the plaintiff.

Canon, *contra*.

Eustis, J., delivered the opinion of the court.

This is an action of a principal against his agent, for exceeding his instructions.

Vigers, the plaintiff, trading under the name of Vigers & Company, in New-Orleans, appointed the defendant his agent during his temporary absence in Europe. The powers given were general, and extended to every necessary act required to be done in the course of the plaintiff's business. He left with the defendant particular instructions, however, and, among other directions, authorized the defendant, if *choice* parcels of tobacco should decline to a certain rate, to ship three hundred-hogsheads to London, one half to be on account of a London house, and the other on account of the plaintiff. The defendant shipped the three hundred hogsheads to London, but also shipped ninety-nine hogsheads of tobacco to New-York. On this latter shipment there was a loss, which forms the subject of the present suit. The plaintiff having paid the amount, had a verdict for three thousand four hundred and three dollars and sixty-six cents. From the judgment on the verdict the defendant has appealed.

From an examination of the instructions of the plaintiff, we find no authority to make the shipment of tobacco to New-York, nor any thing from which such an authority can be implied. He authorizes certain operations in cotton to be undertaken, but those in tobacco were limited to the London market; none others are authorized, or even alluded to; and,

EASTERN DIST. is not bound to trace his title, and considering, further, that
May, 1839. no material informality has been shown in the proceedings
VIGERS ET AL. which followed the said decree, we are of opinion that the
vs. judgment of the District Court must be reversed, and the
KILSHAW. defendant maintained in his possession.

It is, therefore, ordered and adjudged, that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the defendant, with costs in both courts.

VIGERS ET AL vs. KILSHAW.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.**

Where an agent, with general and special powers, is instructed to purchase three hundred hogsheads of tobacco for the London market, and, without additional authority, he ships ninety-nine hogsheads to New-York, on which a loss is sustained, he is answerable therefor.

So, where an agent acts in good faith, but indiscreetly, and exceeds his instructions, he will be responsible to his principal for the loss that results.

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The defendant pleaded a general denial, and averred that the tobacco in question was purchased by the confidential broker of the plaintiff, at his instance, and with his advice. He further states, that he acted in good faith, and to the best

of his knowledge, for the plaintiff's interests, while acting as his agent. He prays that the suit be dismissed.

The evidence showed that the defendant exceeded his instructions in making the purchase in question.

The cause was submitted to a jury, who returned a verdict for the plaintiff, allowing him the sum he claimed. From judgment rendered thereon, the defendant appealed.

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VIGERS ET AL.
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Lockett, for the plaintiff.

Canon, *contra*.

Eustis, J., delivered the opinion of the court.

This is an action of a principal against his agent, for exceeding his instructions.

Vigers, the plaintiff, trading under the name of Vigers & Company, in New-Orleans, appointed the defendant his agent during his temporary absence in Europe. The powers given were general, and extended to every necessary act required to be done in the course of the plaintiff's business. He left with the defendant particular instructions, however, and, among other directions, authorized the defendant, if *choice* parcels of tobacco should decline to a certain rate, to ship three hundred hogsheads to London, one half to be on account of a London house, and the other on account of the plaintiff. The defendant shipped the three hundred hogsheads to London, but also shipped ninety-nine hogsheads of tobacco to New-York. On this latter shipment there was a loss, which forms the subject of the present suit. The plaintiff having paid the amount, had a verdict for three thousand four hundred and three dollars and sixty-six cents. From the judgment on the verdict the defendant has appealed.

From an examination of the instructions of the plaintiff, we find no authority to make the shipment of tobacco to New-York, nor any thing from which such an authority can be implied. He authorizes certain operations in cotton to be undertaken, but those in tobacco were limited to the London market; none others are authorized, or even alluded to; and,

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from the particular manner in which the instructions are drawn up, we must conclude that all shipments other than those authorized were excluded. It might well happen that, in purchases of tobacco for the London market, a purchaser might find it for his advantage, in order to secure tobacco of a quality suitable for that market, to take other hogsheads of an inferior quality, as the article is sold in lots, not assorted according to the standard which exists there. The plaintiff was undoubtedly aware of this fact, and must be supposed to have given his directions in relation to it. His agent, the defendant, he knew might have on hand a certain quantity of tobacco, but there is no evidence that he, the plaintiff, had any idea of trusting it to the chances of a distant market. Duggan, the broker who purchased the

Where an agent with general and special powers is instructed to purchase for his principal three hundred hhds. of tobacco for the London market, and without additional authority he ships ninety-nine hhds. to New-York, on which a loss is sustained, he is liable therefor.

tobacco, says expressly, that "had Mr. Kilshaw sold the ninety-nine hogsheads here, he does not think Vigers would have sustained any loss, as there was a great demand for tobacco." Putting the case on the most favorable footing for the defendant, supposing that the ninety-nine hogsheads of tobacco were left in his hands from the purchases he was obliged to make to complete the three hundred hogsheads for the London market, we find neither necessity nor authority for shipping the former to New-York, for which market, the evidence shows conclusively, the quality of the tobacco was not suited. It is urged in argument, in behalf of the defendant, that his agency was gratuitous, and that he acted in good faith. There is no evidence which shows that the defendant was not to receive a compensation for his agency. The plaintiff did not expect the defendant to charge him any commission on his interest in the London shipment, but that he, the defendant, would be satisfied with the commission of three and a half per cent. on the interest of the London house; but we have seen nothing in the evidence which takes this case out of the operation of the contract of commission. We believe the defendant acted in good faith, but also that he acted indiscreetly, and without authority, in making the shipment to New-York.

So, where an agent acts in good faith but indiscreetly, and exceeds his instructions, he will be responsible to his principal for the loss that results.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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SMITH, F. W. C.
vs.
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PRISCILLA SMITH, F. W. C., vs. SMITH.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where a slave was taken from Louisiana, with the consent of the owner, to France, although afterwards sent back here, she was thereby entitled to her freedom, from the fact of having been taken to a country where slavery is not tolerated, and where the slave becomes free by landing on the French soil.

The Supreme Court will not consider one decision alone as finally settling the jurisprudence on any given point or question of law, which is not settled by positive legislation.

When owners go out of the state with their slaves, and afterwards emancipate them, they must do so according to the laws of the place where the emancipation takes place.

This is a suit for freedom. The plaintiff was the slave of the defendant for life, when, in the spring of 1835, the latter went to France, taking Priscilla with her as her servant. After residing in Paris some months, Priscilla was sent back by her mistress to Louisiana, in the ship Garonne, and arrived in New-Orleans in November, 1835.

She alleges, that, by going to France with the consent of her mistress, she became free, because slavery is not permitted there, and that the moment she landed in that country she became free.

The defendant resists the claim to freedom, and persists in holding the plaintiff as a slave.

Upon this issue the cause was tried.

EASTERN DIST. Witnesses were introduced to show what were the laws of
 May, 1839. France in relation to slavery.

SMITH, F. W. C. *E. Caillard*, Esq., being called on the part of the plaintiff,
 vs. says he studied law in France; that there is no slavery per-
 SMITH. mitted there. As soon as a slave lands on the French soil,
 he is free by the mere fact. The law which established this
 principle was enacted in 1791, and has not been repealed.
 In 1825, the slave trade, which was permitted in France,
 was prohibited.

The plaintiff was taken to France with the view of stay-
 ing there with her mistress, but, on her entreaty, she was
 sent back in the ship Garonne, and hired out in New-Orleans
 on wages, for account of her mistress.

The parish judge was of opinion that the plaintiff, being
 domiciled in Louisiana, must be governed and controlled by
 the laws of this state, in her claim for freedom; that the
 mere fact of going to France, and returning to Louisiana,
 could not take the case out of the general rule. Judgment
 was rendered in favor of the defendant, and the plaintiff
 appealed.

Mace, for the plaintiff, contended that the plaintiff was
 entitled to her freedom from the fact of being taken to France
 by her mistress with the view of residing there. A slave
 once gaining freedom, cannot afterwards be reduced to
 slavery. *Marie Louise, f. w. c., vs. Marot et al.*, 9 *Louisiana*
Reports, 473; *Merry vs. Cheznaider*, 8 *Martin, N. S.*, 699;
Lunsford vs. Coquillon, 2 *Ibid*, 401; *Langlade's Repertoire de*
la Nouvelle Legislation, vol. 2, p. 442, *verbo Esclavage*; *La*
Charte Constitutionnelle, art. 1, 4, 5 and 8.

Mazureau, for the defendant, contended that the judgment
 of the Parish Court was correct, and ought to be confirmed;
 that, even admitting the laws of France are to govern this
 case (which he denied), they do not show that a *black slave*,
 or *any mulatto slave*, is free the moment he is landed in
 France. The law of 1791, it is true, says, "*Tout individu*
est libre aussitôt qu'il est en France;" but Merlin shows that,

by a law of 1802,' slavery has been re-established in all the French colonies, as it was by law anterior to 1789; and he refers to the article "*Gens de Couleur*," where we find a total prohibition of any black, mulatto, or person of color of any sex, being brought within the French republic, on pain of being arrested and detained in prison until they are sent out of the country. From this it must be inferred, that the law of 1791 was no longer in force after 1802. *Merlin's Repertoire de Jurisprudence, verbo Esclavage.*

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2. The laws of Louisiana are the only ones our citizens are bound to know, and they should govern in deciding this case. The defendant was ignorant of the laws of France, and could not be presumed to know that if she took her slave there it would be emancipated. It was certainly contrary to her intention, for, as she was travelling, she took her servant to attend on her, and not to become free.

3. The *Statut Personnel* is the law which regulated the condition of the plaintiff here, and which followed her every where. Being a slave here, she was a slave wherever she went. See *Merlin's Repertoire, verbo Statut Personnel*, and the effect of that statute.

4. These principles have been recognized by the Supreme Court of the United States, in the case of *The United States vs. Skiddy*, and the seizure of the ship *Garonne*, in which *Priscilla* was sent back from France to Louisiana a slave, and in the same condition in which she went out to France. That court expressly recognizes her as a slave domesticated in Louisiana, in consequence of which it was no violation of the laws of the United States to bring her back into the country as a slave. See 11 *Peters' Reports*, 77.

5. There is no law in Louisiana to prevent the defendant from taking her slave to France, and returning with her, or sending her back and holding her in slavery. Taking or sending a slave to a country where no slavery is permitted, is not one of the modes provided by our laws to emancipate slaves. The manner pointed out by these laws is the only way in which slaves can be emancipated; all other modes of emancipation are null and void. 1 *Moreau's Digest*, 455.

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6. By the act of 1830, slaves that are emancipated must quit the state; whence it is concluded that any slave, on being emancipated here since that act, has no right to be here, and ought not to be heard in a court of justice. See *Session Acts of 1830, March 16, sec. 10.*

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment which rejects her claim to her freedom.

She admits she was once the slave of the defendant, who took her to France, and with whom she remained for three or four months, after which she was sent back to this state.

Where a slave was taken from Louisiana, with the consent of the owner to France, although afterwards sent back here, she was thereby entitled to her freedom, from the fact of having been taken to a country where slavery is not tolerated, and where the slave became free by landing on the French soil.

This case cannot be distinguished from that of *Marie Louise, f. w. c., vs. Marot et al.*, 9 *Louisiana Reports*, 473. In both cases it was proven that "there is no slavery permitted in France; that, as soon as a slave lands on the French soil, he is free by the mere fact."

The judge of the Parish Court has admitted, that if the decision of this court, in the case of *Marie Louise*, be correct, it affords a legitimate rule by which the present case is to be determined; but he contends that a single decision of this court does not prevent the re-examination of the principle recognized when it comes up the second time, and is presented to the consideration of the court.

The case of *Marie Louise* is not the first in which the Supreme Court of this state has been called upon to revise the judgment of an inferior court, in relation to the right to the freedom of a slave, in consequence of his having been carried by a former master into a country the laws of which do not tolerate slavery. About fifteen years ago, the court of the third judicial district having recognized the right to freedom of a slave, carried from Kentucky into the state of Ohio by her former owner, the person who claimed her as his property deeming himself aggrieved, sought relief by appeal to this court. See *Lunsford vs. Coquillon*, 2 *Martin, N. S.*, 401.

That case received an attentive consideration, and the judgment of the District Court was affirmed. The question

was not *res nova* in the jurisprudence of these states; the plaintiff relied on a decision of the Court of Appeals of the state of Kentucky, which fully supported her claim.

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Ten years after that decision, this court expressed the opinion, in the case of *Louis, f. m. c., vs. Cabarrus et al.*, 7 *Louisiana Reports*, 170, that the judge *a quo* erred in refusing to charge the jury, "that proof of the residence of the plaintiff in the state of Ohio during the space of two or three years, unconnected with any other proof, was insufficient in law to establish freedom." A negative pregnant with the affirmative, that such a residence, connected with other proof, to wit, that it was with the consent, and agreeably to the will of the master, would entitle such slave to his freedom.

In the same case, the judge having charged the jury, "that the consent of the owner that the slave should go into the state of Ohio and perform labor was insufficient to entitle him to his freedom," this court was of opinion that the law was too loosely expressed and indefinitely stated; and that "the consent of the master that the slave should go and perform work and labor in Ohio, does not of *itself* free the slave, though this may be effected *by the slave's going there under this permission.*"

We agree with our learned brother in the Parish Court, that "more than one decision of the supreme judicial tribunal is required to settle the jurisprudence on any given point or question of law;" and accordingly, as there has been three decisions of this court on the question on which he differs from us, we might consider the law as settled by these repeated decisions, in which all the members of the court concurred, and which were in accordance with three judgments of the District Courts; nevertheless, we have attended to the new considerations which have been submitted to us. The counsel for the defendant and appellee contends, that the legislature has provided two modes of emancipation, to wit, that of slaves having attained the age of thirty years and upwards (*Louisiana Code, article 185, et seq.*), and of slaves under that age (1 *Moreau's Digest*, 456), and that no emancipation can take place in any other manner.

The Supreme Court will not consider one decision alone as finally settling the jurisprudence on any question of law, which is not settled by positive legislation.

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When owners go out of the state with their slaves, and afterwards emancipate them, they must do so according to the laws of the place where the emancipation takes place.

This is certainly true of emancipation in the state; but the legislature has recognized the right of owners to emancipate their slaves in other states. See *Session Acts of 1830, sec. 16, p. 94.*

When owners going out of the state with their slaves, afterwards emancipate them, they must do so, not according to the laws of Louisiana, but according to the laws of the country where the emancipation takes place. It has been further urged, that owners of slaves cannot evade the laws of this state regulating emancipation by taking them out of the state, fraudulently and collusively, with the view of emancipating them, when the law forbids it, *viz.*, slaves of bad character, or to avoid giving bond with security required by law. To this the answer is, that if the emancipation, in such a case, is to be declared null and void, it cannot be so on the application of a party to the collusion and fraud.

It has been said that the plaintiff cannot be heard, because the law requires emancipated slaves to withdraw from the state. To this it may be answered, that the object of the suit is to procure the means of complying with the law, by removing the obstacle which the defendant opposes to its execution; that the obligation to remove from the state has not the effect of an outlawry; and that the act of 1830, already cited, authorizes slaves removed from this state, and emancipated in another state of the Union, to return. It is true, the plaintiff in this case obtained her emancipation in France, and does not therefore come within the letter of that act. It is said she comes within the spirit; for the reason why slaves emancipated in the other states are permitted to return is, that they have their relations, connections and friends here, whom it would be cruel to prevent them from rejoining.

The parish judge imagines he has discovered a distinct feature in the present case, from that of Marie Louise, who was that of a *statu libera* at the time she left Louisiana, while the present plaintiff was a slave for life at her departure. A *statu libera* is a slave until the moment she becomes free, to all intents and purposes, with the excep-

tions introduced by the code, none of which were invoked in that case. EASTERN DIST.
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It does not appear to us that any thing authorized the Parish Court to decide this case on other principles than those settled by our jurisprudence in similar cases.

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LOCKE ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; and that the plaintiff be declared a free woman, and that the defendant be for ever enjoined and prohibited from disturbing her in the enjoyment of her freedom, the latter paying costs in both courts.

OXNARD VS. LOCKE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

An auctioneer's certificate is admissible in evidence, even when it shows the sale of certain property was ordered by a different person, than is alleged in the pleadings, when he is shown to have been the agent.

After the death of the auctioneer, parole proof is the best evidence of the correctness of the entries in his record book, and which the nature of the case admits.

In reciprocal contracts, he who desires to comply, when the other delays, must at the proper time offer to perform his part, to put the other in default.

Joint purchasers cannot be condemned *in solido* for the payment of the price.

This is an action to compel the defendants, who were joint purchasers at an auction sale, to comply with the terms and pay the price.

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May, 1830.

OXNARD
VS.
LOCKE ET AL.

The defendants resisted under several pretexts which are stated in the opinion of this court.

The plaintiff had judgment *in solido*, against them for the price, in case of failure to comply with the terms of sale, &c. They appealed.

T. Slidell, for the plaintiff.

G. B. Duncan, for the defendants and appellants.

Rost, J., delivered the opinion of the court.

The plaintiff seeks to compel the defendants to comply with the adjudication of a sale of real estate, and prays that in default thereof they may be adjudged to pay him *in solido*, the amount of the adjudication, to wit, four thousand dollars with interest and costs.

The defendants resist the plaintiff's demand on the following grounds :

I. That the sale at auction was informal and void.

II. That they are released from the obligations of taking the property and paying the price, by the delay, negligence and refusal of the plaintiff to comply with his part of the contract, and make a title.

III. That the property was incumbered with mortgages in such a manner, that the plaintiff could not convey it to the defendants.

IV. That the plaintiff's title is defective, and that he was insolvent when he tendered the conveyance.

The District Court gave judgment in favor of the plaintiff, agreeably to the prayer of his petition, and the defendants appealed.

Two bills of exception were taken during the trial.

One to the opinion of the court admitting in evidence an auctioneer's certificate, showing that the lots in controversy had been adjudicated by him to the defendants, by order of William L. Hodge, on the ground that the adjudication was not made by order of the plaintiff, and that the certificate was inadmissible under the issue.

2. To the opinion of the court admitting in evidence the record book of the auctioneer, showing the sale of the lots, and permitting the correctness of the entries in said book to be proved by a witness; the auctioneer being dead at the time, on the ground that the entries were not in the handwriting of the auctioneer, and were not signed by him.

I. We are of opinion the judge did not err. William L. Hodge is shown to have been the general and special agent of the plaintiff, by him duly authorized to cause the sale to be made by the auctioneer.

II. After the death of the auctioneer, proof of the correctness of the entries in his record book, was the best evidence the nature of the case admitted of. Upon the merits, the first and fourth grounds of defence are entirely unsupported by evidence; and the third, is shown to be unfounded, by the certificate of the recorder of mortgages. In relation to the second ground, if the plaintiff occasioned unnecessary delays and failed or refused for a great length of time to comply with his obligations, the defendants have not done that which on their part they were bound to do, in order to take advantage of that refusal or neglect; *Louisiana Code, article 1907.*

It appears to us the court erred in giving judgment against the defendants, jointly and severally, for the amount of the purchase money, in case they failed to comply with the conditions of the sale. The obligation was joint according to the auctioneer's certificate, and there is no evidence in the record to justify us in changing its nature.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended, so as to condemn the defendants to pay the plaintiff the sum of seven thousand dollars, jointly, instead of *in solido*, and otherwise affirmed: it is further decreed, that the defendants pay the costs of the District Court; those of the appeal to be borne by the appellee.

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OXFORD
VS.

LOCKE ET AL.

An auctioneer's certificate is admissible in evidence, even when it shows the sale of certain property was ordered by a different person, than is alleged in the pleadings, when he is shown to have been the agent.

After the death of the auctioneer, parole proof is the best evidence of the correctness of the entries in his record book, and which the nature of the case admits.

In reciprocal contracts, he who desires to comply, when the other delays, must at the proper time offer to perform his part, to put the other in default.

Joint purchasers cannot be condemned *in solido* for the payment of the price.

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GOODING vs. ATLANTIC MARINE AND FIRE INSURANCE CO.

GOODING

vs.

ATLANTIC MA-
RINE AND FIRE
INSURANCE CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the judgment is based on the verdict of a jury, involving questions of fact merely, which appear to have been satisfactorily proved, it will not be disturbed. Informalities complained of, not sufficient to reverse the judgment, will not be noticed.

This is an action on a policy of insurance, in which the plaintiff claims eight thousand seven hundred and eight dollars, the value of certain goods insured by the defendants, on board the steamer *Privateer*, at and from New-Orleans, for Coates' Bluff, on Red River, with the privilege to re-ship in keel-boats from thence to Fort Towson.

The plaintiff alleges, that the goods were re-shipped in Red River, on board a keel-boat called the *Mary Musgrove*, and while pursuing on her voyage to Fort Towson, she struck a snag under water, and sunk, so that the goods were totally lost to the owner, by one of the perils insured against, to wit, the perils of the river. He further shows, that he has abandoned to the insurers as for a total loss, and made the necessary demand and preliminary proof, and the defendants refuse to pay the same. He prays judgment for the amount of his claim, with interest and costs.

The defendants pleaded a general denial, and set up various objections in the answer to the demand of the plaintiff. They averred, the keel-boat was not in good condition and sea-worthy, and not sufficiently manned for the voyage she undertook; that the plaintiff did not accompany the goods, and labor, travel, and work in the safe-keeping of the goods as he was bound to do, in case of loss; that the goods were wasted, distributed and disposed of in a negligent and unlawful manner by the plaintiff's agent, &c.; that the preliminary proofs were never furnished of said loss, and that there was no proper abandonment of the goods to the defendants, &c.

The testimony introduced in the case was voluminous and full, in support of the plaintiff's loss by the dangers of the

river. It was fully shown that the keel-boat was in good trim, and highly recommended as suitable for the voyage by intelligent and disinterested persons. The loss was almost entire. A few of the goods were taken out of the wreck and river, in a very damaged state, and sold; the loss and claim of the plaintiff was duly notified to the defendants. The policy on which the action is brought, is in the usual form of marine or river insurances.

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RINE AND FIRE
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The judge presiding charged the jury, and a verdict was returned for the plaintiff.

The defendants' counsel took a bill of exception to the refusal of the judge to instruct the jury, that from the evidence the abandonment was not made in due form and in proper time; that from the evidence, the plaintiff had been guilty of gross negligence, &c. and that under all the circumstances, the action could not be maintained, &c.

The court was satisfied with the verdict and gave judgment confirming it. The defendants appealed.

Benjamin, for the plaintiff.

Grymes, for the appellants.

Eustis, J., delivered the opinion of the court.

This is an action on a policy of insurance, for a total loss. The voyage was from New-Orleans to Coates' Bluff, on Red River, with the privilege of re-shipping in keel or steam-boats to Fort Towson. There was various matters of defence set up in the answer of the defendants, none of which appear to have been established. The bill of exception to the refusal of the judge to charge the jury as requested by the defendants' counsel, and to non-suit the plaintiff, contain nothing upon which we can reverse the judgment of the court below. The verdict of a jury was in favor of the plaintiff, and as the questions involved in the case are those of fact, and appear to us to have been satisfactorily proved the judgment of the court below is affirmed with costs in both courts.

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ROBERTS ET AL.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

A debtor who is about to absent himself from the state, even for a limited time, may be held to bail, if he leaves no property in the state.

So, where the captain of a steam-boat, trading to Havana, was about leaving New-Orleans, the place of his domicil, on a regular voyage, to return immediately: *Held*, that he was liable to arrest at the suit of a creditor, when it was not shown that he owned or possessed any property.

This case comes up on an appeal from the decision of the district judge on a rule, taken on the plaintiff, to show cause why the defendant should not be discharged from arrest and bail.

It was shown that the defendant commanded the steamer Cuba, trading between New-Orleans and Havana, and was about to depart on a trip, or voyage, when he was arrested and held to bail at the suit of the plaintiff. It did not appear that the defendant had any visible property, but there was no intention of leaving the state shown, except on the voyage to Havana and back again.

The district judge was of opinion, that, as the defendant was a sea-faring man by profession, but having his domicil in New-Orleans, it would be depriving him of the means of supporting himself and family, to allow him to be arrested under such circumstances. The rule was made absolute, and the plaintiffs appealed.

Benjamin, for the plaintiffs and appellants.

L. C. Duncan, *contra*.

Rost, J., delivered the opinion of the court.

The defendant, held to bail upon an action of debt, took a rule upon the plaintiffs to show cause why the order of bail should not be set aside, on the ground that he was a resident of New-Orleans, and had no intention of removing or departing from the state.

The witnesses introduced by the defendant on the trial of the rule all stated that they did not believe he had any intention of leaving the state permanently; but the testimony establishes the fact that he was, at the time of the arrest, the captain of a steam-boat trading out of the state.

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The District Court, considering that his domicile was in New-Orleans; that, being a seaman, the departure anticipated was a departure in the prosecution of the business by which he gained a living; that, to detain him, would be to deprive him of the means of supporting himself and family; and that the useful class to which he belongs ought not to be subjected to harder terms of existence than other classes of the body politic, made the rule absolute, and the plaintiffs appealed.

We hope we will ever be foremost in the support of sailors' rights, but we have looked in vain in the law, to find any thing that justifies the exception made in their favor by the judge in the present case, and we must say, that the force of his reasons does not strike us more than it would in any other case of arrest. When a debtor is confined within the walls of a prison, it matters little, we apprehend, whether he was in the habit of supporting himself and his family by seafaring or by labor on shore; he is, in all cases, alike cut off from his means of support. It is well settled, that a person about to absent himself, even for a limited time, may be held to bail, if he leaves no property in the state; and the defendant has neither alleged nor proved that he was possessed of any. *Code of Practice, art. 212 and 213.*

A debtor, who is about to absent himself from the state, even for a limited time, may be held to bail, if he leaves no property in the state.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and it is further ordered and adjudged, that the rule taken by the defendant be discharged, the order of arrest maintained, and the case remanded to be proceeded in according to law, the defendant and appellee paying the costs of this appeal.

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GRAVES ET AL.

VS.

ROY.

GRAVES ET AL. VS. ROY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
WATTS PRESIDING.

A principle which enables a debtor to put his creditors at defiance, and dictate to them the terms on which they are to receive a portion of their claims, is repudiated by our law.

So, where the debtor, residing in Virginia, made an assignment of half his interest in a ship then at sea, for the benefit of certain of his creditors, and excluded those who dissent and refuse to release him: *Held*, that such assignment is null and void, as against the dissenting creditors.

It has been decided in Virginia, that an assignment, with a condition for a release of the debtor, would not render a deed of trust *invalid*, provided the debtor conveyed the *whole of his property* for the benefit of his creditors.

This is an action by the acceptors against the drawer of a bill of exchange, alleged to have been accepted and paid for the benefit and accommodation of the defendant: the plaintiffs claim a balance due on the bill of one thousand two hundred and sixty-five dollars; and, on several shipments of tobacco to London, the further sum of nine thousand eight hundred dollars, for which they pray judgment.

Writs of attachment issued, and, among other property, one undivided half of the ship *Rob Roy* was seized.

The defendant resided in Virginia.

Walter De Lacy, also residing in Norfolk, Virginia, intervened, and alleged that the one half of the ship *Rob Roy*, attached as the property of the defendant, was, on the 26th May, 1837, at Norfolk, assigned and transferred to him, as trustee, in trust to pay certain creditors, who yet remain wholly unpaid, and that he had possession under the transfer previous to the attachment, and that he is entitled to hold and dispose of the same for the benefit of the trust creditors.

The plaintiffs joined issue on the demand in intervention, and alleged that the assignment was fraudulent as to them, and prayed that the deed of trust be declared null and void,

and that they have judgment contradictorily with said intervenor for their claim, &c.

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The laws of Virginia were admitted in evidence, and the deed of assignment was shown to be executed in Norfolk, in the state of Virginia, between parties residing there. The several claims of the parties were admitted, and the whole contestation arose on the validity and effect of the assignment.

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The district judge was of opinion, that, by the laws of Virginia, (the parties residing there) the assignment was valid. Judgment was rendered in favor of the intervenor, and the plaintiffs appealed.

I. W. Smith, for the plaintiffs and appellants.

1. The intervenor, De Lacy, has not alleged or proved a compliance with the condition expressed in the assignment, which requires that he or his agent shall forthwith proceed to take into his possession the interest of the defendant in the ship, so soon as practicable after her arrival in the waters of the United States.

2. The right to perfect the assignment against the creditors without actual delivery, because of the ship being at sea, is waived by providing specially for the delivery, as one of the conditions of the assignment.

3. By fixing the time, place and manner of transferring possession of the ship, the defendant has subjected the assignment, so far as regards its effects, to the law of the state into which the ship should first come; and, by our law, the assignment is void.

4. The assignment cannot prevail against the creditors until the delivery has taken place, as provided for; but the attachment of the plaintiffs was levied by taking possession of the ship on the fifth day after her arrival at the Balize, and prior to any attempt by the intervenor to obtain the possession.

5. The deed of trust is fraudulent by the statute of Virginia, because the ship was not in the county of Norfolk when the deed was recorded. 1 *Revised Code*, p. 362, 372;

EASTERN DIST. *Tate's Digest*, p. 95, 4, sec. 4; *Ibid*, p. 101, 18, sec. 11; May, 1839. 2 *Tucker's Commentaries*, p. 331.

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6. The assignment defrauds the plaintiffs, because the defendant was then in insolvent circumstances, and he has not by that deed assigned all his property. *United States vs. Howland*, 4 *Wheaton's Reports*, 108; *United States vs. Mott*, 1 *Paine's Reports*, 186; *United States vs. Clark*, *Ibid*, 629; *Leavings & Mead vs. Brinkerhoff*, 5 *Johnson's Chancery Reports*, 335; *Brashear vs. West*, 7 *Peters' Reports*, 614; 2 *Tucker's Commentaries*, p. 435.

7. The assignment hinders and delays the plaintiffs, by the clause requiring the creditors to grant a full discharge of their debts, under penalty of being debarred from sharing in the proceeds. *Tate's Digest*, p. 104, 1, sec. 2; *Hamilton vs. Russell*, 1 *Cranch's Reports*, 316; *Fitzhugh vs. Anderson*, 2 *Henning & Mumford's Reports*, 302.

8. The plaintiffs, as non-residents, are entitled to equal privileges in our courts with resident plaintiffs. To set aside the assignment made in Virginia in favor of a Louisiana creditor, and sustain it against a New-York creditor attaching in our courts, would be unconstitutional as well as unjust. *Constitution of the United States*, art. 4, sec. 2; *Story's Conflict of Laws*, p. 479, sec. 571; and see the authorities there cited.

Harrison and *L. Peirce*, for the intervenor.

Eustis, J., delivered the opinion of the court.

This case comes before us on an appeal from a judgment of the court below, rendered on an intervention of *Walter De Lacy*, residing in Virginia, claiming, as a trustee, one half the ship *Rob Roy*, which had been attached in this suit as the property of the defendant. The judgment was in favor of the trustee, and the attaching creditors have appealed.

The instrument under which the interest in the ship was conveyed, was executed at Norfolk, in Virginia, on the 20th of May, 1837. The parties to the instrument we shall consider as domiciliated in that state at the date of its execu-

tion the ship was at sea : no question can arise in relation to the possession ; and our inquiries are necessarily confined to the validity of the instrument, according to the laws of Virginia.

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The intervening party claims under a deed of trust which gives to the trustee the half interest in the ship *Rob Roy*, and the interests of Roy in various shipments of cotton and tobacco, and, generally, all the debts due, or which may become due prior to the date of the deed, for the benefit of certain creditors, excluding those who may have demands against him arising from what is called in the deed, *country damage* to the tobacco shipped by him, or which may have been sustained in the warehouses before shipment. He divides his creditors into two classes : those of the first are to be paid in full ; those of the second are deprived of any benefit arising from the property in trust who shall refuse to release or discharge the said Roy from the debt of the creditor thus provided for.

A principle like this, which enables a debtor to put his creditors at defiance, and dictate to them the terms on which they are to receive a portion of what is due to them, is repudiated by our laws, and we think the counsel of the plaintiffs has successfully shown that a condition like this would render an assignment of an insolvent's property void as against dissenting creditors, according to the principles of the common law, which prevails in the other states of the Union. 16 *American Jurist*, 285 ; *Opinion of Judge Ware, in the case of Lord vs. The Brig Watchman* ; 2 *Kent's Commentaries*, 536, and *Notes*.

A principle which enables a debtor to put his creditors at defiance and dictate to them the terms on which they are to receive a portion of their claim, is repudiated by our law.

The counsel for the intervening party has called our attention to a case decided in the Court of Appeals of Virginia, in April, 1837, the case of *Skipwith's Executor vs. Cunningham*, in which this question is fully investigated by the learned presiding judge of that court, and in which the opinion of the court is, that a condition for a release of the debtor would not render a deed of trust like this invalid, provided the debtor conveyed the whole of his property to the trustees for the benefit of his creditors ; but, adds judge

So, where a debtor residing in Virginia, made an assignment of half his interest in a ship then at sea, for the benefit of certain of his creditors, and excluded those who dissent and refuse to release him : *Held*, that such assignment is null and void as against the dissenting creditors.

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It has been decided in Virginia, that an assignment, with a condition for a release of the debtor, would not render a deed of trust invalid, provided the debtor conveyed the whole of his property for the benefit of his creditors.

Tucker, "On this subject a distinction has been made in the cases, between the conveyance of the whole and the conveyance of part only of the debtor's property, upon condition that the creditors should compound and accept a part of their debts, and give a release for the residue." The former is considered admissible and valid, the latter as oppressive upon the creditors, and as fraudulent and pernicious in its tendencies. In this case the trust was to accrue to the benefit of any creditor who should release the debtor.

The deed under consideration did not purport to convey the whole of the debtor's property, and only operated upon the property mentioned in it. He conveyed half the ship Rob Roy, his interest in certain shipments, and the debts due to him, at the same time excluding certain claims from the benefit of the deed, which he did not pretend were fraudulent, or in any respect unfounded. He may have had other property, and there is nothing in the deed from which the contrary is inferred. See *5 Johnson's Chancery Reports*, 330; *United States vs. Howland*, 4 *Wheaton*, 108. We therefore consider, that there is nothing before us from which we can pronounce that the assignment under consideration conveyed the whole of the debtor's property to the trustee; and, according to the principles laid down in the case which is the most favorable to the claims of the intervening party, we must declare the instrument void and without effect, as to the plaintiffs, who are dissenting creditors.

The judgment of the District Court is, therefore, reversed, and judgment is entered against the intervening party, Walter De Lacy, with costs in both courts, and the case is remanded for further proceedings.

PEYROUX vs. CHASAL.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.PEYROUX
vs.
CHASAL.

In a case of redhibition depending upon the testimony of witnesses, which stands uncontradicted, and the judge *a quo* gave full faith to it, this court cannot afford relief to the appellant.

This is an action to rescind the sale of a slave, and recover back the *price*, on account of redhibitory defects and maladies with which the slave was affected at the time and since the sale. The fact of the slave being sorely afflicted with rheumatism, so as to render him worthless, was sworn to by witnesses, to whose testimony the judge *a quo* gave credence. There was judgment for the plaintiff, and the defendant appealed.

D. Seghers, for the plaintiff.

Benjamin, for the appellant.

Rost, J., delivered the opinion of the court.

This is an action instituted to rescind the sale of a slave, on account of redhibitory defects, which the plaintiff alleges existed before and at the time of the sale, to the knowledge of the defendant, and were concealed by her.

The defendant acknowledged that she had sold the slave, but denied all the other allegations of the petition, and averred that she had sold him in good faith, and that the plaintiff knew said slave well, and was aware of his qualities and vices. The court below gave judgment in favor of the plaintiff, and the defendant appealed. We see nothing in the record that could induce us to relieve the defendant. One witness testified, that, before the sale, the slave was sick all the while with the rheumatism, and that he was often so sick that he could not use his limbs or feed himself. Two other witnesses swore that the disease has continued upon him since, and entirely disables him. One of those

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DONLIN.

witnesses stated that the slave had been hired to the corporation, but that he was sent back to the plaintiff, owing to his rheumatic pains: this testimony stands uncontradicted, and, as the judge who tried the case in the first instance gave full faith to it, we feel bound to do the same.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WELD ET AL vs. DONLIN.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.**

A fraudulent sale of personal property, although followed by possession, gives no right of property to the purchaser; and the true owner has his action against the latter for its recovery.

This is an action to recover sixteen bales of cotton in the possession of the defendant, which the plaintiffs allege belong to them, as the true owners, and which has been illegally and wrongfully taken from them. They further show, that said cotton is worth three hundred and twenty dollars, and pray that it be sequestered, and that they have judgment for the cotton or its value, together with damages.

The defendant set up a claim to the cotton in controversy under a sale to him from one Tankersley & Co., made in the usual course of trade, and for a fair and full price in the open market, &c.

Upon these pleadings and issues the case was tried before the court.

The material facts and evidence of the case are fully detailed in the opinion of this court, which follows.

The district judge came to the conclusion, from the evidence, that the sale from Tankersley to the defendant was unauthorized and tortious, if not felonious. Judgment was rendered in favor of the plaintiff, and the defendant appealed.

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vs.
DUNLIN.

L. C. Duncan, for the plaintiff.

M. Millen, for the appellant.

Eustis, J., delivered the opinion of the court.

This case turns exclusively on a question of fact. Tankersley & Dench sold to the plaintiffs sixteen bales of damaged cotton, on the 18th of November, 1887. Part of the price, two hundred and fifty dollars, was paid, and the cotton was delivered to the plaintiffs. The cotton, when sold, was at the yard of Messrs. Frerets, and was removed, by the plaintiffs' order, to the pickery of Kelly. To these facts, we have the testimony of Dench, one of the sellers. He says, that the cotton was removed by the plaintiffs' order to the pickery, for the purpose of being packed. Tankersley, on the 27th of November following, after the dissolution of his partnership with Dench, traded off the cotton to the defendant, in payment of a private debt due by him to a person named Ruddock. The defendant obtained possession of the cotton. Tankersley, in his deposition, says, that the cotton was sold and delivered to Weld & Co. at the time just mentioned; and although he declares, in his cross-examination, that the cotton was not delivered to the plaintiffs at the time the money was advanced, still he does not contradict the fact alleged in the testimony of Dench, that the cotton was removed from Frerets' press by the plaintiffs' order. If we did not consider the fact of delivery established, (and of this opinion was the judge of the court below) we should have come to a different conclusion, provided the rights set up by the defendant had been based upon a *bond fide* sale, according to the usual course of business, for a valuable consideration. As the matter stands, we consider

A fraudulent sale of personal property, although followed by possession, gives no right of property to the purchaser; and the true owner has his action against the latter for its recovery.

EASTERN DIST. the subsequent sale to the defendant as a fraud on the
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vs.
BONNY.

The judgment of the court below is affirmed, with costs.

LALLANDE vs. BONNY.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
 BUCHANAN PRESIDING.**

The power of arbitrators may continue for three months after the submission, unless the parties agree to revoke it sooner. But if they, or any one of them, refuse to act, the parties are left to their legal remedy, without any delay.

Judicial arbitrators, appointed to decide a suit already pending, may refuse, without assigning reasons, at any time before taking the oath.

This case turns upon an exception taken to the institution of suit, on the ground that it was premature.

The exception is founded on a submission by the parties of the matters now in controversy to arbitrators, who, in case of disagreement, were authorized to choose an umpire. The parties entered into bond, on the 30th November, 1837, in the penal sum of three thousand dollars, binding themselves to abide by the decision of Samuel Hermann, jr., and James P. Freret, and their umpire, in case of disagreement. They disagreed, and chose Mr. Musson as umpire. Sometime afterwards, having conferred with each other, and heard the statements of the parties, the arbitrators being unable to agree, Mr. Hermann declined acting any further in the matter. None of them were sworn. On the 6th of February, 1838, this suit was instituted.

The district judge was of opinion, that according to article 3072, of the Louisiana Code, the power of arbitrators necessarily continued for three months after the date of their appointment; that, consequently, their term of appointment did not expire before the 1st of March, and until that time, neither party could resort to his action at law. Judgment was rendered sustaining the exception and dismissing the suit, and the plaintiff appealed.

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vs.
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L. Janin, for the plaintiff and appellant. The submission can produce no effect whatever, for the arbitrators are named in it: no provision is made for the case of the refusal to act of either; its execution depended upon the acceptance of the arbitrators; the acceptance dates from the moment when they take the oath; they can neither act nor be considered as having accepted, until they have taken the oath. *Louisiana Code*, 3078, 3086. 3 *Martin*, 317.

2. An agreement to submit to arbitration, becomes null by the death of *one* of the arbitrators. *Ibid.*, article 3099. By analogy of reasoning, the refusal of one of them to act, puts an end to it.

3. The special law on this subject is contained in the statute of March 16, 1822. 1 *Moreau's Digest*, 460. Even a decision made by arbitrators will be set aside, if it was not made by the persons named in the submission, or if the arbitrators were not sworn. *Ibid.*

In this case the arbitrators did nothing. They never fixed a time for the decision of the controversy, nor did they give notice to the parties to produce their evidence. *Louisiana Code*, 3078, 3079. Nor could they know whether they would agree or disagree, until they had thus legally investigated the matter; nor could they, until then, appoint an umpire. *Ibid.* 3087.

Canon, contra.

Rost, J., delivered the opinion of the court.

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May, 1839.

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 vs.
 BONNY.

The parties to this controversy, wishing to settle amicably certain differences existing between them in commercial operations on bank stocks, made on joint account, agreed in writing under the penalty of three thousand dollars, to abide by the decision of Samuel Hermann and James P. Freret, or of a third arbitrator chosen by them, in case they should not agree. The arbitrators first promised to act, and before being sworn, having received the statement of one of the parties, they had one or two conversations together on the subject, out of the presence of the parties, when finding that they were unable to agree, they proposed to leave the matter to Mr. Musson, who was then present, and to choose him as umpire; his appointment was not reduced to writing, and he was not sworn. Subsequently, the statement of the other party was submitted to them, and being still unable to agree, Samuel Hermann refused to act any longer. Freret and Musson were of opinion, that Bonny was right, but no decision was given, and the plaintiff instituted the present action, within the three months that followed the date of the agreement, to obtain a judicial investigation of the transactions which he had agreed to submit to the decision of the above named persons.

The defendant excepted to the action, on the ground that all the matters alleged by the plaintiff had been, by the agreement already alluded to, submitted to the arbitration of the persons therein named.

The District Court being of opinion, that under the article 3072, of the Louisiana Code, the power of the arbitrators was to endure three months, and that the court could not presume that the refusal of Hermann to act would continue during the whole time, thought that the action was premature and maintained the exception. The plaintiff appealed.

We are of opinion that the court made a false application of article 3072, of the Louisiana Code. It is true, that it provides that the power of the arbitrators may continue three months after the date of the submission, unless the parties agree to revoke it, but it goes on the supposition that the

arbitrators are willing to serve. When their refusal is ascertained, the parties are left to their legal remedy, and may have recourse to it without any delay. Where the amicable jurisdiction which the submission created recuses itself, the submission stands as if it had never been made. The Code of Practice, article 450, which provides that the arbitrators shall not be allowed to resign their appointment without a good cause, applies only to judicial arbitrators, appointed to decide a suit already pending, and even in that case, they may refuse to act without assigning reasons, at any time before taking the oath.

We are of opinion that the exception was improperly sustained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, the defendant's exception overruled, and the case remanded, with directions to the district judge to proceed therein according to law, the defendant and appellee paying the costs of this appeal.

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May, 1839.

ROBESON ET AL.
VS.
MISS. AND ALA.
R. R. CO. ET AL.

The power of arbitrators may continue for three months after the submission, unless the parties agree to revoke it sooner. But if they, or any one of them refuse to act, the parties are left to their legal remedy, without any delay.

Judicial arbitrators, appointed to decide a suit already pending, may refuse without assigning reasons at any time before taking the oath.

ROBESON ET AL. VS. MISSISSIPPI AND ALABAMA RAIL ROAD
COMPANY ET AL.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where garnishees were asked if they had property of the defendant in their possession, and whether it was worth a certain sum, and they answered categorically, "Yes, one hundred and four bales of cotton:" Held, that they could show, when called on by the plaintiff to pay the proceeds over, in satisfaction of his judgment against the defendant, that the cotton was previously attached in their hands, at the suit of other creditors.

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vs.
MISS. AND ALA.
N. E. CO. ET AL.

Eustis, J., dissenting.—Where garnishees, by their answer, acknowledge that they have property in their possession belonging to the defendant sufficient to satisfy the plaintiffs' debt, they should not be allowed afterwards to defeat this acknowledgment, when called on to pay the plaintiffs' judgment, by pleading that the property had been *previously* attached.

This suit commenced by attachment. The plaintiffs filed their petition the 5th July, 1838, claiming judgment for the sum of two thousand dollars, and interest. They ask, that Lyons, Harris & Co., and others, be ordered to answer on oath the annexed interrogatories, and condemned, as garnishees *in solido*, to pay the amount of the plaintiff's demand.

Interrogatory.—"Had you, at the time of service of this interrogatory upon you, or have you had at any time since, in your possession, or under your control, any moneys, cotton, &c., or property belonging to the defendant? If yea, please specify and detail the same fully and particularly, with the value thereof, and whether the same amounts to the sum of two thousand dollars, with interest, &c."

The sheriff returned, that he had duly served the attachment on the garnishees, and attached in their hands property of every kind belonging to the defendant, to an amount sufficient to satisfy the writ, &c.

On the 11th July, Lyons, one of the firm of Lyons, Harris & Co., on the part of the firm, answered, "Yes, one hundred and four bales of cotton."

The other garnishees gave detailed and full answers.

The defendant pleaded a general denial, and the plaintiff had judgment against him for the sum claimed.

In January, 1839, the plaintiff took a rule on the garnishees, Lyons, Harris & Co., to show cause why they should not be condemned *in solido* to pay to the plaintiff the amount of their judgment against the defendants: to which they replied, that the cotton attached in their hands in this suit had been previously attached at the suit of S. W. Oakey & Co., by whose request and assent it had been sold, and the proceeds, amounting to five thousand one hundred and

eighty-seven dollars, was in their hands, subject to such attachments as might be adjudged entitled to it.

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May, 1889.

On hearing the parties, the parish judge decided, that, as the property in the hands of the garnishees had been previously attached in another suit pending in the district court, the rule must be discharged; reserving to the plaintiffs their right of proceeding in said court, contradictorily with the attaching creditors.

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MISS. AND ALA.
R. R. CO. ET AL.

The plaintiffs appealed.

I. W. Smith, for the plaintiffs and appellants.

1. The plaintiffs interrogated the garnishees on facts and articles: "Have you property in your possession, or under your control, belonging to the bank, and, if so, is it worth two thousand dollars, interest, &c.?" They answer, "Yes; one hundred and four bales of cotton." When ruled to show cause why they should not be condemned to pay the two thousand dollars, they admit the receipt of five thousand one hundred and eighty-seven dollars and sixty-one cents for the cotton. In substance, they plead, in avoidance of the legal effect of their answer on oath, that the proceeds of the cotton are not under their control or in their possession absolutely, but that they possess and control them at the pleasure of the District Court, which had attached them. In their answer under oath, they clearly had the right to state what manner of possession and control they had, to what restrictions they were subjected, with what privileges the ownership of the cotton by the bank was burdened.

2. The right of the plaintiffs against the garnishees was only inchoate when the answer under oath was filed. It was perfected by the judgment against the bank. When the plaintiffs chose to exercise it, it was too late for the garnishees to divest them of it.

3. The garnishees were bound by their answer made under oath. They cannot add to or change the legal effect of that answer by any subsequent act of theirs. Their answer to the rule is, in effect, an amendment of their original answer, setting up a defence not mentioned in the original answer. 5 *Louisiana Reports*, 86; 8 *Ibid*, 160.

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4. The garnishees well knew, when they answered the interrogatories, if there was a previous attachment levied. Why did they not inform the plaintiffs of it? Why suffer the plaintiffs to prosecute their suit to judgment before alleging a defence, which renders nugatory their answer under oath? Can they now take advantage of their own wrong?

Straubridge and L. Peirce, for the defendant and garnishees.

Rost, J., delivered the opinion of the court.

In this case, the commercial firm of Lyons, Harris & Co. were cited as garnishees, and asked to answer on oath whether they had in their possession, or under their control, property belonging to defendants, and whether it was worth the amount for which attachment had issued, to wit, two thousand dollars. The garnishees answered in these words: "Yes; one hundred and four bales of cotton." Judgment was rendered against the defendants, and the plaintiffs, finding some previous liens on the property attached, took a rule upon the garnishees to show cause why they should not be condemned *in solido* to pay to the said plaintiffs the amount of the judgment rendered in their favor. The garnishees showed for cause, that the cotton attached in their hands had previously been attached at the suit of S. W. Oakey & Company, by whose request the same had been sold, and that the proceeds remained in their hands, payable to such of the attaching creditors as may be entitled thereto. The court, after having discharged the rule reserved to the plaintiffs their right to proceed contradictorily with the other attaching creditors. The plaintiffs appealed.

The plaintiffs do not complain of the sale of the cotton by the garnishees; and they now stand in the situation in which they would be if it had been sold by order of the court, on their application, and that of the other attaching creditors.

We are of opinion, that the district judge took a correct view of the rights of the parties to this controversy, and that the judgment ought to be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Eustis, J.—I dissent from the opinion of the court, both as to the merits of the case, and as to the mode of proceeding.

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E. E. CO. ET AL.

I do not wish to be understood that there may not be cases in which a garnishee would not be relieved from the consequences of an erroneous answer; but in this case, I consider the garnishees have no claims whatever to relief, as the matter stands before us.

The answer determines the fact, that, at the time of the service of the attachment, there was in the possession of the garnishees sufficient property of the defendant to satisfy the plaintiffs' debt. The object of the interrogatory was to ascertain from the garnishees if they had in their hands property of the defendants, which was available to the plaintiffs in their attachment. "Have you property in your possession, or under your control, &c.," was the question. The answer is in the affirmative, positive and direct.

If the cotton had been previously attached, it was not under the control of the garnishees; it was, in the eye of the law, in the custody and possession of the sheriff; (*Code of Practice*, 257): and though it may have been permitted to remain in their hands, it was in the custody of the law. *8 Martin*, 511.

In the case of *Deblanc vs. Webb and others*, the Supreme Court held, in a case in which the garnishee neglected to answer one of the interrogatories put to him, but had answered fully two others, that, by neglecting to answer the interrogatory categorically, they had subjected themselves to have judgment rendered against them, according to the spirit of article 263, *Code of Practice*. "To permit the garnishees now to avoid the legal effect of their negligence in not answering this interrogatory, would, in our opinion, violate express law, and might in other cases, lead to prevarications and unnecessary delays in the administration of justice."

The garnishees in this case, by their answer, acknowledge that they have property in their possession belonging to the

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defendant sufficient to satisfy the plaintiffs' debt; in the other case, this fact is taken for confessed by the court, and in both cases the garnishees are in precisely the same situation in respect to the plaintiffs; one is bound by his judicial, the other by his implied judicial confession. If judgment be lawfully rendered against them in one case, the rules of practice, as well as those of justice, require that the garnishees be condemned in the other.

The case of *Blanchard vs. Cole*, 8 *Louisiana Reports*, 157, is similar, in point of principle, to the former. The answer to the interrogatories were not sufficiently precise and formal, and the judgment was rendered that the plaintiffs' judgment should be satisfied out of the property attached.

It strikes me as particularly novel, that a garnishee, after having made an acknowledgment, in his answer on oath to interrogatories propounded to him, should be able to defeat entirely its operation, by merely pleading a matter which the garnishee knew perfectly well at the time of making his declaration. If error, fraud, violence, or the loss of the property attached had been urged on behalf of the garnishees, a different case would have been presented; but the only fact for which they claim an exemption from the operation of their judicial confession, they knew at the time of making it as well as they do now, and neglected to disclose in their answers. The plaintiffs, without any notice of this attachment which is to be used to defeat their claim, proceed in their suit to judgment.

Had they been apprised of this attachment; had they been notified of the existence of any claim on the property attached; had they been informed that it was in the custody of the law, and might not be rendered available to them, they might have sought their remedy elsewhere against the defendant or his property, but in the present instance they have been induced to continue their proceedings by the confession of the garnishees that they had property in their hands which would be applied to the payment of their debt. It would be permitting a party to take advantage of his own neglect, to defeat the plaintiffs on the grounds assumed by

the garnishees. I do not wish to be understood as saying that the garnishees would necessarily be exposed to loss by being obliged to pay an amount sufficient to satisfy the judgment from the funds in their hands, but that even if they were, that circumstance would not change the action of the court, in a case like this, against them.

As to the mode of proceeding adopted by the plaintiffs, I think the case is equally free from difficulty. The garnishee is a party to the suit, and, as to the matters at issue between him and the plaintiff, he is a defendant, as much so as the defendant himself. Whether the plaintiff wishes to contradict the garnishee's answers; whether the garnishee answer evasively, or does not answer at all, the proceedings are directly against the garnishee in the same suit. I believe such to be the general practice in this state. I have met with no instance to the contrary. In every case which has come before the Supreme Court, and which I have examined, the proceedings against the garnishee are direct in the same suit, and he is considered a defendant. See the cases cited. *Allyn vs. Wright*, 9 *Martin*, 273, and 1 *Louisiana Reports*, 230; *Code of Practice*, 264.

The plaintiffs having obtained a judgment against the defendant, took a rule on the garnishees to show cause why they should not be condemned *in solido*, as garnishees, to pay to the plaintiffs the amount of their judgment.

The garnishees, in answer to the rule, come into court, and allege for cause, that the cotton attached in this case had been previously attached in their hands at the suit of S. W. Oakey & Company, by whose request and assent the same has been sold, and that the proceeds, amounting to five thousand one hundred and eighty-seven dollars and sixty-one cents remain in their hands, subject to these attachments.

S. W. Oakey & Company are not parties to this suit. Under the article 396, *et seq.*, of the Code of Practice, the mode is pointed out in which their rights are to be asserted, and if they do not choose to litigate their pretensions in this suit, I see no reason why they should be an impediment and

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hindrance to these proceedings: at all events, I do not think the garnishees, in this instance, have a right to set them up for their own protection against the supposed consequences of their own neglect.

Here, then, are the garnishees, having in their hands the proceeds of the property attached, and placing them at the disposal of the court, leaving Oakey & Co., the creditors in the previous attachment, to assert their rights in the manner which they think best to adopt; and they may have very good reasons for not becoming parties to this suit: they may have other property attached sufficient to satisfy their debt, or may not choose to contest the plaintiffs' demand. I think a sufficient part of the property attached ought to be applied to the payment of the judgment obtained against the defendant. 2 *Gallison's Reports*, 96. The rule asks for judgment against the respondents as garnishees *in solido*. The form of the rule taken on the garnishees I consider to be immaterial, as they have not objected to it, but have, by their answer, brought the merits of the case fully before the court, on which the court ought to decide according to the rights of the several parties before them.

I think the judgment of the court below ought to be reversed, and that the judgment should be for the plaintiffs, as before stated.

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OLLIE vs. OGILVIE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

A proprietor who divides a piece of his land into town lots, is not required to submit a plan of his town lots for the approval of the police jury.

So, the owner is not guilty of deception towards purchasers of lots, when he omits to mark on his plan a *private* road which had been used to pass over his land; and which is afterwards taken by the police jury for a public one. It is sufficient to designate the public road and levee, existing as such at the time.

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This is an action to rescind the sale of certain town lots in Greenville, a small *villa* laid out on the banks of the Mississippi, a few miles above New-Orleans in 1836.

The plaintiff demands the rescission of the sale of certain lots in Greenville, on the ground that the defendant, his vendor, acted in bad faith in two respects: 1st, in having avoided to submit the plan of Greenville to the police jury of the parish of Jefferson, previous to the offering for sale of the lots comprised in that plan: 2d, in having sold the lots in question, although he knew that the grounds occupied by them upon his plan was destined for the use of an intended new levee and public road. There is a further allegation of deception on the part of the plaintiff, in selling a portion of the property under the name of batture lots, while in reality there was no batture at that place.

As to the first of these alleged instances of bad faith, no law has been cited which makes it the duty of any citizen who converts a *rural* into an *urban* estate, by dividing a plantation into building lots, to submit his plan of division of his plantation to the supervision or the approval of the police jury.

Upon the second ground, to wit, that the plaintiff has been evicted of a portion of the property sold, by the formation of a road and levee, it would seem to be rather a matter for the action of warranty than of rescission of the contract, but for the allegation of bad faith in the vendor, in withholding from his vendor the knowledge which he is said to have possessed of the probability and necessity of the change in the road. It is proved that a road was made several years before the sale with the consent of the then proprietor of the ground, on the line of the road ordered by the police jury subsequently to the sale, which road was used by the

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public, and it is said this road should have figured upon the plan of Greenville submitted to the bidders at the time and place of sale; that said road did not figure in said plan, and thereby the defendant rendered himself guilty of a fraudulent concealment of a feature in the property materially affecting the value of the lots purchased by the plaintiff. The solution of this point in the case depends upon the answer to the following query: Was the road made by Bozeman a public road agreeably to law? For if this question be resolved in the affirmative, it is clear that the defendant could confer upon his vendees no right to the use of the soil occupied by such road, and the omission of it upon the plan was a deception injurious to the bidders, and entering into the definition of fraud, in article 1841 of the Louisiana Code.

The first section of an act of Assembly of the 13th of March, 1818, declares that all roads in this state that have been opened, laid out or appointed by virtue of any act of the legislature theretofore made, or by virtue of an order of any of the police juries in their respective parishes, are declared to be public roads, as also are all roads made on the front of their respective tracts of land by individuals, when the said lands have their fronts on any of the rivers or bayous within this state.

The second section of the same law enacts that all roads thereafter to be opened and made shall be laid out by a jury of freeholders consisting of at least six inhabitants of the parish where the said road is to be made, which jury shall be appointed for that purpose by the police jury who order the said road to be laid out, &c.

The third section provides that all roads so laid out shall be deemed public roads.

This statute is the law which prescribes the formalities necessary to establish a public road in Louisiana at this time.

The district judge was of opinion the plaintiff failed to make out his case, entered judgment for the defendant, and the plaintiff appealed.

J. Seghers, for the plaintiff and appellant.

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Roselius, contra.

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OSILVIE.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment which rejects his claim to the rescission of the sale of certain lots which he purchased from the defendant.

His claim rests on the following allegations:

1. That the defendant sold according to a plan which he had omitted to submit for the approbation of the police jury.
2. That he concealed from the plaintiff a material circumstance, to wit, that a part of the lots sold was destined to be occupied as a levee and public road.
3. That he deceived the plaintiff by selling part of the property as batture lots, when in reality there was no batture at that place.

It does not appear to us that the District Court erred.

I. No law requires him, who divides a tract of land into lots, to submit any plan to the police jury.

II. It is not shown that there was a destination of any part of the premises to be used as a levee or public road. A private road had been made by a former possessor of the land, which being found more commodious than the public road along the levee, was more generally used than the latter, which was consequently neglected. The former had been offered to the syndic, and accepted by him, as a substitute for the public road. After the sale, the police jury converted the private road into a public one. The district judge has correctly concluded, that the defendant was guilty of no deception in omitting to mark the private road on his plan, and in designating the public one only. The latter had not lost its character, and the former had not become a public road by the mere acceptance of the syndic, who was without authority to alter or change the character of either; and it has been correctly observed, that, if the private road had been marked on the plan, this circumstance might have given rise to the claim of a servitude injurious to his interest and that of the purchaser.

A proprietor who divides a piece of his land into town lots, is not required to submit a plan of his town for the approval of the police jury.

So, the owner is not guilty of deception towards purchasers of lots, when he omits to mark on his plan, a private road which had been used to pass over his land, and which is afterwards taken by the police jury for a public one. It is sufficient to designate the public road and levee, existing as such at the time.

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The action of the police jury after the sale was legal or illegal. If legal, it was *damnum absque injuria*; if illegal, it could give no claim to the plaintiff on the defendant.

III. The surveyor who drew the plan by which the sale of the lots in question was made, has attested to its correctness; and his testimony is not contradicted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HOFFMAN vs. ATCHESON ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

When it is shown that the defendant acknowledged the plaintiff's services were worth a certain sum, he cannot be allowed to plead prescription against any part of the claim.

Judgment affirmed, with ten per cent. damages, as for a frivolous appeal.

This suit commenced by attachment. The plaintiff claimed the sum of four hundred and twenty-nine dollars for his wages as carpenter on board the steam-boat *Mississippi*, and had her attached.

The defendant pleaded a general denial, and the prescription of one year.

It was shown on the trial that the plaintiff and defendants acknowledged, after the former had left the boat, that the balance due the plaintiff was two hundred and thirty-eight dollars and twenty-five cents, for which judgment was rendered. The defendants appealed.

Bradford, for the plaintiff.

I. W. Smith, contra.

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Rost, J., delivered the opinion of the court.

The plaintiff attached the steamer *Mississippian* for wages due him as carpenter on board of her.

The counsel appointed by the court to represent the absent defendants filed a general denial.

On the trial of the cause, the plaintiff adduced proof of the length of time during which he had been employed, and several of the witnesses stated what they conceived his services to be worth : it being shown by the defendants' counsel, that the plaintiff had agreed to receive from the officers of the boat a sum less than the sum claimed, or than that to which the evidence might have entitled him, the District Court gave judgment in his favor for that sum, and the defendants appealed.

The sum allowed appears to have been acknowledged by one of the defendants as being justly due the plaintiff, and we are at a loss to understand how the defendants could have expected to maintain a plea of prescription for any part of it. This appeal was taken for delay, and the plaintiff is entitled to the damages which he claims.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts, and ten per cent. damages for a frivolous appeal.

CROSS vs. ARMOR.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The vendor, when his vendee demands security against the danger of eviction, is only bound to offer a person able to contract, with sufficient

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property, and domiciled within the jurisdiction of the court. The purchaser, or vendee, is not entitled to demand *real security*.

The plaintiff obtained an injunction to prevent the defendant from enforcing a judgment against him, alleging that he had refused to pay the price of a piece of ground for which this judgment was rendered, because he was interrupted in his possession, and in danger of eviction.

The defendant offered James Purdon as surety against the supposed danger of eviction, in order to do away the pretext for withholding the price, or the purchase money, set up by the purchaser and the plaintiff in injunction. He refused to receive the surety offered, alleging he was entitled to real security.

The defendant took a rule on the plaintiff to show cause why the surety should not be received, and the injunction dissolved. This rule was made absolute, and the plaintiff appealed.

Lockett, for the appellant.

L. Peirce and *Starrett*, *contra*.

Eustis, J., delivered the opinion of the court.

This is an appeal from an order of the District Court dissolving an injunction. The plaintiff being threatened with eviction of property purchased from the defendant, attempts to withhold the payment of the price on that ground. The defendant having offered James Purdon as his security for damages resulting from the eviction, the judge dissolved the injunction which he had granted against the proceedings of the defendant for the recovery of the price. The only question before us is the sufficiency of this security. The plaintiff contends that he is entitled to have real security, that personal security is insufficient. In this case the plaintiff would have a right to suspend the payment of the price, unless the defendant prefer to give him security. *Louisiana Code, 2535.*

Whenever a person is bound by a judgment to give security, he must offer a person able to contract, of property sufficient to answer for the amount of the obligation, and whose domicile is within the jurisdiction of the court where it is to be given. As no objection is made to the surety on either of these grounds, and as we consider the plaintiff is not entitled to demand real security, the judgment of the District Court is affirmed, with costs.

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vs.
RUTHERFORD
AND METCALF.

CROOKE ET AL. vs. RUTHERFORD AND METCALF.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The affidavit necessary to obtain an attachment for a debt *not due*, must be special, according to the act of 1826, and the creditor or his agent must swear that the "debtor is about to remove his property out of the state, before the debt becomes due."

The agent of the plaintiffs obtained an attachment against certain property of the defendants in the city of New-Orleans, on the following affidavit :

' Personally appeared, Leo Delbanco, agent of William T. Crooke & Co., and made oath that Rutherford & Metcalf, are justly indebted to said firm in the sum of seven thousand dollars, and that they reside permanently out of the state of Louisiana, wherefore, he prays, that an attachment may issue against the goods, etc., of said Rutherford & Metcalf."

The defendants' counsel took a rule on the plaintiffs, to show cause why the attachment should not be dissolved, on several grounds, but principally on the insufficiency of the affiant.

The following judgment was pronounced on the rule :

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AND KETCALF.

"This suit is instituted for the amount of sundry notes of hand, stated in the petition at seven thousand dollars. No particular description of the notes are given, but they are referred to, as annexed to the petition.

The plaintiffs, however, have only annexed to their petition three notes, of which the aggregate amount is only one thousand four hundred and sixty dollars and sixty-five cents. One of these notes for the sum of four hundred and eighty-six dollars and eighty-nine cents is not due.

The Code of Practice only provides for attachments for debts which are due, article 240. The article 243, prescribes the form of the oath. An amendment of the Code of Practice, made on the 7th April, 1826, allows attachments to be issued for the securing of *debts not yet due*, but prescribes in such case a form of oath essentially different from that required by the Code of Practice, in the case of debts, of which the term has expired. The agent of plaintiffs has, however, only made the latter oath. This attachment must, therefore fall so far as regards all that portion of the claim of plaintiffs not yet due. What may be the precise amount of that portion, the present state of the pleadings does not enable me to say; I must, therefore, make use of the power vested in me by the amendment in 1826, of the 173d article of the Code of Practice, and order the other notes upon which the demand is founded, to be filed within a reasonable delay."

The rule was made absolute, and it was ordered that the power of attorney under which the agent acted, be filed in ten days; that all the notes sued on be filed within that time, and in default thereof, that the suit be dismissed. The plaintiffs appealed.

Wolfe, for the plaintiffs.

F. B. Conrad, contra.

Rost, J., delivered the opinion of the court.

The plaintiffs, upon the oath of their agent, that the defendants owed them the sum of seven thousand dollars, and that the said defendants resided permanently out of the state, sued out a writ of attachment under which certain moveables of the defendants were attached.

The defendants came into court and took a rule upon the plaintiffs to show cause why the attachment should not be dissolved, on the ground that the sum claimed by the plaintiffs was not due as alleged, and on several other grounds not necessary to mention. It appeared on the trial of the rule, that the sum claimed was made up of several promissory notes, the greater part of which were not due at the time the suit was instituted. The District Court dissolved the attachment upon all the notes not due, and the plaintiffs appealed.

They can receive no relief from us, and had no reasonable grounds to expect it. The act of 1826 has prescribed the affidavit necessary in all cases where the debt is not yet due. The plaintiffs have failed to bring themselves within the provisions of that statute.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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May, 1859.

BERTHOUD
vs.
MISSISSIPPI MAR-
INE AND FIRE
INSURANCE CO.

BERTHOUD vs. MISSISSIPPI MARINE AND FIRE INSURANCE CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The plaintiff established his claim for a less sum than demanded, and had judgment, and the only defence was want of an insurable interest, which was conclusively proved. Judgment confirmed.

It was proved that Berthoud, the plaintiff, wrote a letter from New-York, to the master of the ship Moro Castle, to

EASTERN DIST. have her insured. On being shown this letter, Mr. L. H. Gale, to whom the ship was consigned, had her insured for the plaintiff. The defendants appealed.

CUTLER
vs.
COCHRAN.

Strawbridge, for plaintiff.

Lockett, contra.

Eustis, J., delivered the opinion of the court.

This is an action on a policy of insurance on the ship *Moro Castle*, for the sum of six thousand dollars, being for one-half her value, fixed by the defendants at the sum of twelve thousand dollars. Before the expiration of the policy, the ship was destroyed by fire at the Levee in New-Orleans.

The only defence set up, is the want of interest on the part of the insured, and as the interest of the plaintiff is conclusively established, and the loss is proved, the judgment of the court below is affirmed with costs.



CUTLER vs. COCHRAN.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

On the dissolution of a partnership by mutual consent, it still continues for the purpose of liquidation; and all the partners must join in a suit against any of its debtors for the collection of debts due the firm.

So, on a dissolution of the firm by the death of a partner, the surviving partner cannot sue without joining the representatives of the deceased one.

Where an obligation is made to a commercial firm, the partners composing it must join in the action. The debt is due the partnership *collectively*, and not to one or other of the partners as creditors *in solido*.

An action cannot be maintained by one partner for the *use of himself and the others*, when his authority to sue is expressly denied and not proved. EASTERN DIST.
May, 1839.

This is an action on three several promissory notes subscribed by the defendant and made payable to the order of Messrs. Edward Clarke & Co., dated at New-York, September 20th, 1836.

CUTLER
vs.
COCHRAN.

The plaintiff sets out the case thus: "The petition of Samuel Cutler, of the city of Boston, state of Massachusetts, *for himself and for the use of* Edward Clarke and Edward L. Penniman, also of said city of Boston, and therein lately doing business, under the style of Edward Clarke & Co., respectfully shows, &c." He prays judgment for the amount of the notes sued on.

The defendant admitted his signature to the notes, but expressly denies every other allegation in the petition. He specially denies the right and title of the plaintiff, Cutler, to the notes sued on, and his authority to institute suit, and prays that it be dismissed.

Upon these pleadings and issues, the cause was tried before the court and a jury.

The plaintiff's attorney was the only witness, and his testimony all that was offered, except the notes.

The witness stated that he had called on the defendant before he instituted suit, and desired him to settle and pay the notes, who expressed great anxiety and willingness to do so. That after several interviews and fruitless negotiations, they were unable to come to any settlement, and suit was then commenced.

The judge charged the jury, "that after the dissolution of the commercial partnership referred to in the petition, it was not necessary for all the partners to transfer the notes sued on to the plaintiff, in order to enable him to collect them; that the obligees in this case are joint and several obligees, not joint obligees alone." The defendant's counsel excepted to this charge.

The jury returned a verdict for the plaintiff, and from judgment rendered thereon, the defendant appealed.

EASTERN DIST.
May, 1839.

CUTLER
vs.
COCHRAN.

Sterrett, for the plaintiff.

Strawbridge, for the defendants, insisted that it was necessary for all the partners to join in this suit. That in all actions on contracts, the joint contractors must be made parties. *Gow on Partnership*, 137. *Collier on Partnership*, 395-6. 3 *Louisiana Reports*, 395. 7 *Ibid.* 197.

Martin, J., delivered the opinion of the court.

The defendant and appellant relies for the reversal of the judgment against him, on a suggestion that the judge's charge to the jury was erroneous; that the plaintiff had no authority to sue, and should have been non-suited.

The plaintiff, for the use of Clark & Penniman, his former commercial partners, and himself, sues for the amount of three notes of the defendant, payable to the late firm of E. Clarke & Co., of which the said Clarke, Penniman and the plaintiff, were the only members. The judge charged the jury, that after the dissolution of the firm, it was not necessary for all the partners to transfer the notes sued upon, to the plaintiff, in order to enable him to collect them. That the obligees in this case are joint and several obligees, and not joint obligees only. To this charge the defendant's counsel excepted.

It appears to us the court erred. The defendant and appellant, by his answer, had expressly denied the plaintiff's property in the note, and his right to sue thereon, without the authority of his former partners. He did not produce any.

On the dissolution of a partnership by mutual consent, it still continues for the purpose of liquidation, and all the partners must join in a suit against any of its debtors for the collection of debts due the firm.

On the dissolution of a commercial partnership by mutual consent, the partnership continues for the purpose of liquidation: but as during its existence all the partners must join in a suit against its debtors, although either of the partners might receive payment of the debt, so, after the dissolution, an individual partner, notwithstanding he may still receive payment, cannot institute a suit without joining his co-partners. He cannot have more power after the dissolution of the partnership than he had before.

The general rule is, that in actions founded on contracts, all the joint contractors must be made parties. *Gow on Partnership*, 137. *Louisiana Code*, 2080. EASTERN DIST.
May, 1839.

On the dissolution of a partnership by the death of a partner, the survivor cannot sue, without joining the representatives of the deceased one. In the case of *Crozier vs. Hodge*, 3 *Louisiana Reports*, 357, this court held, that "Where the obligation is made to a commercial firm, the partners composing it must join in the action; for the debt is due to the *partnership collectively*, and not to one or other of the partners, as creditors *in solido*."

It remains to be considered, whether the suit being brought by one of the former partners for himself and for the use of the two others, the latter may be considered as parties thereto. We do not think so. No man is a party plaintiff to a suit, who does not cause it to be instituted, or authorizes its institution in his name. The authority of Cutler to sue for his former partners, or to their use, is expressly denied, and no evidence of it has been administered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the case remanded for further proceedings, with leave to the plaintiff to amend his petition; he paying the costs of the appeal, and, also, those of the court below.

CUTLER
vs.
COCHRAN.

So, on a dissolution of the firm by the death of a partner, the surviving partner cannot sue without joining the representatives of the deceased one.

Where an obligation is made to a commercial firm, the partners composing it must join in the action. The debt is due the partnership collectively and not to one or others of the partners as creditors *in solido*.

An action cannot be maintained by one partner for the use of himself and the others, when his authority to sue is expressly denied and not proved.

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May, 1839.

DENTON
 vs.
 COMMERC'L AND
 N. E. BANK OF
 VICKSBURG.

DENTON vs. COMMERCIAL AND RAIL ROAD BANK OF VICKSBURG.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
 NEW-ORLEANS.

The competency of a witness, or his interest in the matter in controversy, may be ascertained by examining him, on his *voir dire*; if the party objecting does not choose to do this, the party offering him may rebut the presumption of his incompetency by other evidence.

The partner of a *firm*, subscribed as security to an attachment bond, who was absent when the *name of the firm* was signed, is *prima facie*, a competent witness to testify in the case.

Bank notes when presented at the bank and payment refused, become mere evidences of debt, fluctuating in value according to the credit of the bank, and are fair subjects of trade and commerce. Trading in them is not putting them in circulation *anew*, so as to do away with the original demand and the effect of non-payment.

This is an action to recover the sum of twenty thousand seven hundred dollars, in lawful money of the United States, for this amount of bank notes issued by the Commercial and Rail Road Bank of Vicksburg, in the state of Mississippi. The plaintiff alleges, that these notes had been presented at the bank, and payment in gold or silver demanded, which was refused by the bank. He prays judgment therefor, with eight per cent. interest per annum and costs.

The plaintiff attached property and effects in the hands of William M. Beal, in New-Orleans, and cited him as garnishee in the case. The commercial *firm* of Wilcox, Anderson & Co., were accepted as security in the attachment bond, and the name of the firm *subscribed* thereto by one of the partners.

The defendants appeared by counsel, and excepted to the action, on the ground that the notes sued on had been put in circulation subsequently to the demand of payment, and that no demand had been made by the petitioner. This exception was dismissed at instance of the plaintiff's counsel, and the defendants ruled to answer. The plea of the general issue was then put in.

Upon these pleadings and issues, the cause was tried before the court and a jury. EASTERN DIST.
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The testimony of G. W. Huntington, taken by consent, states that he was the agent of the late firm of Wilcox & Fearn, and as such, collected the notes sued on, in Mississippi, from various persons, and presented them to the paying teller of the bank, at the banking house of defendants, in Vicksburg, which was refused; the bank having stopt payment. These notes then belonged to the firm of Wilcox, Anderson & Co., of which witness was a member, and by them, subsequently, transferred to the plaintiff.

The witness was absent when the name of the firm was subscribed to the attachment bond in this suit.

The defendants' counsel objected to reading Huntington's deposition, on the ground that he was a member of the firm of Wilcox, Anderson & Co., which signed the attachment bond. The court admitted the evidence, because the signature of the firm only bound the member who signed it, and that it appeared by the testimony of Mr. Turner, that Huntington was absent when the bond was signed, and that the signature was in the handwriting of Mr. Wilcox. The defendants' counsel excepted to all this testimony.

The jury returned a verdict for the plaintiff, and from judgment confirming it, the defendants appealed.

C. M. Conrad, for the plaintiff.

Hoffman, for the defendants.

Rost, J., delivered the opinion of the court.

This action was commenced by attachment upon sundry notes, issued by the defendants as bank notes, and which they had refused to redeem, on presentation, in gold or silver, as they were bound to do by their charter.

Some moveable property was attached, and William M. Beal, the agent of the defendants in New-Orleans, was cited as garnishee, and required to answer interrogatories. An attorney having been appointed by the court to represent the

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absent defendants, the case was submitted to a jury, who gave a verdict in favor of the plaintiff for the amount claimed, and eight per cent. interest, agreeably to the laws of the state of Mississippi. The defendants' counsel having failed in his attempt to have the verdict set aside and a new trial granted, judgment was entered against them, and they appealed.

Two bills of exception were taken on the trial by the defendants' counsel. 1st. To the opinion of the court admitting George W. Huntington, as a witness, on the ground that he was a partner of the firm of Wilcox, Anderson & Co., which firm was designated by the judge as the security of the plaintiff on the attachment bond, and had subsequently signed said bond.

2d. To the opinion of the court, admitting a witness to prove that the signature of Wilcox, Anderson & Co. on the bond was in the handwriting of Wilcox, one of the partners; that Huntington was absent from the state at the time the bond was signed; and that the act of partnership does not authorize the signing of such bonds.

The competency of a witness, or his interest in the matter in controversy, may be ascertained by examining him on his *voir dire*; if the party objecting does not choose to do this, the party offering him may rebut the presumption of his incompetency by other evidence.

The partner of a firm, subscribed as security to an attachment bond, who was absent when the name of the firm was signed, is *prima facie*, a competent witness to testify in the case.

The judge did not err in overruling these exceptions. When the witness Huntington was offered, the defendants' counsel might have ascertained, by examining him on his *voir dire*, whether he had any interest in the controversy. If the defendant's counsel did not think it safe to do so, the plaintiff had the right to rebut, by other evidence, the presumption which the signature of Wilcox, Anderson & Co. to the attachment bond created against the competency of the witness. The fact that he was out of the state, and that he did not sign the bond, made him *prima facie* a competent witness; and if he had assented to or ratified the act of his partner, the defendants' counsel was bound to prove it, but has not attempted to do so. It was not necessary to prove that the act of partnership did not authorize the signing of the bond; we are bound to presume that it did not, until the contrary is shown.

Before pleading to the merits, the defendants' counsel excepted to the action on the ground that the notes sued

upon had been transferred to the plaintiff by the person who presented them to the bank; that they had been put anew in circulation by this transfer, and that no demand was averred to have been made by the plaintiff.

This exception was overruled, and although it was earnestly pressed upon us in argument, it appears to have been abandoned in the court below. However this may be, it cannot avail the defendants. It is proved that the notes were presented at the bank, and payment refused. When they ceased to be convertible into gold or silver, they lost the character of bank notes, and became mere evidences of debt, which fluctuated in value as the reputation of the bank for solvency increased or diminished. While this state of things lasted, they were fair subjects of bargain and sale. Trading in them was not putting them in circulation, and the plaintiff, under his purchase, acquired them with all the benefits and advantages which had vested in the previous holder, by the fact of his demand of payment. Upon the merits, the verdict and judgment are fully supported by the evidence, and must be affirmed.

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GRAY ET AL.
vs.
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Bank notes when presented at the bank and payment refused, become mere evidence of debt, fluctuating in value according to the credit of the bank, and are fair subjects of trade and commerce. Trading in them is not putting them in circulation anew, so as to do away with the original demand and the effect of non-payment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

GRAY, DURRIVE AND CO. vs. BLEDSOE ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Factors or commission merchants cannot claim a lien or privilege on goods, moneys or property for a general balance of account against the owner, over an attaching creditor.

The only privilege a factor or commission merchant has is expressly given by article 3,214 of the Louisiana Code, and is limited to specific ad-

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vances made on goods consigned, after they have come into his possession, or he has received a bill of lading or letter of advice that they have been despatched to him.

This is an action against the firm of Bledsoe & Samuel, residing in Brandon, Mississippi, on their promissory note, in which property and effects belonging to them was attached in the hands of N. & J. Dick & Co., who were cited as garnishees.

The whole case turns on the question of privilege set up by the garnishees on property and money of the debtors in their hands, for a general balance of account due to them.

The Parish Court disregarded the privileged claim set up by the garnishees, and gave judgment that they pay over the money and effects in their hands to the plaintiffs, in satisfaction of their judgment against the defendants.

The garnishees appealed.

L. Peirce, for the appellants.

F. B. Conrad, contra.

Rost, J., delivered the opinion of the court.

The plaintiffs proceeded by an attachment against the defendants, who are a commercial firm residing at Brandon, in the state of Mississippi, and cited the firm of N. & J. Dick & Co. as garnishees.

The garnishees answered, that they had nothing in their possession belonging to Bledsoe & Samuel, but that they had seventy-three hogsheads of tobacco and fourteen hundred and ninety-two dollars belonging to Samuel & Bledsoe, and that the said Samuel & Bledsoe were indebted to them in the sum of six thousand one hundred and seven dollars and twenty-nine cents, for acceptances of bills of exchange, and for which they claimed a lien and privilege on the property and money in their hands.

The plaintiffs obtained a judgment against the defendants, and subsequently took a rule upon the garnishees to

show cause why judgment should not be entered against them for the amount of said judgment, and why they should not deliver up to the sheriff seventy-three hogsheads of tobacco, or the proceeds of the same, in satisfaction thereof: the rule was made absolute, and the garnishees appealed.

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BLISSON ET AL.

They have shown that they were the factors of the defendants, and have adduced in evidence their general account with them, showing in their favor, at the time the attachment was levied, the balance which they have stated to be due them for bills then accepted and since paid; they claim a lien and privilege for that balance upon the monëys and effects of the defendants in their hands. We have no hesitation to say, that they ought in justice to have it; and if the laws regulating their rights left us in doubt, the obvious policy and wisdom of protecting our own citizens and giving security to commerce, would induce us to adopt the interpretation for which they contend; but those laws are too clear and explicit to leave their meaning and intent doubtful. The article 3,152 of the Louisiana Code provides that privileges can be claimed only for those debts to which it is expressly granted in the Code, and article 3,214 is the only one which treats of the privileges of factors or commission agents. That article expressly limits the privilege to specific advances made on merchandize, after it has come into the possession of the factor, or after he has received a bill of lading or letter of advice that they have been despatched to him. These two provisions of our law taken together necessarily exclude all privileges for balances of general accounts, and the legislature alone has power to remedy the evil. See *Baldwin vs. Bracy*, 1 *Louisiana Reports*, 363; *Hagan et al. vs. Sompeyrac*, 3 *Ibid*, 157; *Collins vs. Austin et al.*, 3 *Ibid*, 302.

Factors or commission merchants cannot claim a lien or privilege on goods, moneys or property for a general balance of account against the owner, over an attaching creditor.

The only privilege a factor or commission merchant has, is expressly given by article 3214 of the Louisiana Code, and is limited to specific advances made on goods consigned, after they have come into his possession, or he has received a bill of lading or letter of advice that they have been despatched to him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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WEYMAN ET AL.

vs.
CATER ET AL.

WEYMAN ET AL. vs. CATER AND CROPP.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The original and supplemental petition are to be taken as one and the same proceeding. Any variance between a note or document annexed and the description of it in the petition, is cured by the note or document, when offered in evidence, which must govern.

This is an action commenced by attachment, in which the plaintiffs allege the defendants are indebted to them in the sum of six hundred and forty dollars, with four dollars for cost of protest, and interest at the rate of six per centum, it being the amount of a promissory note, which was subscribed by the defendants, of which the petitioners allege they are the holders and owners. The defendants reside in Wetumpka, Alabama.

The note was not annexed to the petition. About a month afterwards, a supplemental petition was presented with the note, and protest annexed, which the plaintiffs pray might be *considered part* of the original petition. The *note* thus annexed and filed, is for the sum of six hundred and forty-two dollars and sixty-eight cents.

On the trial, the defendants objected to the note and protest being read in evidence, because there was a material variance between it and the one described in the petition. This objection was sustained by the court. There is also in the bill of exception taken to the opinion of the court, the following admission in a memorandum signed by the counsel for the defendants and plaintiffs: "It is also admitted by the defendants, that the plaintiffs are at this time the owners of the note, and that the same was properly protested."

The note and protest being excluded from the evidence, the plaintiffs were unable to make out their case, and judgment of non-suit was rendered, from which they appealed.

Clarke, for the plaintiffs.

Elmore and King, contra.

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Rost, J., delivered the opinion of the court.

WEITMAN ET AL.
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CATER ET AL.

The plaintiffs sued the defendants on a promissory note, not annexed to their petition, but alleged to be for the sum of six hundred and forty dollars. After the appearance and answer of the defendants, the plaintiffs filed a supplemental petition, to which the note and protest were annexed, as forming a part thereof. The defendants filed an answer to this supplemental petition, containing several interrogatories having reference to the note thereto annexed, and the time, place and circumstances of the protest. They, moreover, made a special admission in the record, that the plaintiffs are the owners of the note, and that the same had been properly protested.

On the trial of the cause, the defendant objected to the note annexed to the supplemental petition being given in evidence, because it was for the sum of six hundred and forty-two dollars and sixty-eight cents, whereas that described in their original petition, was only for six hundred and forty. The court maintained the objection, and gave against the plaintiffs a judgment of non-suit: from that judgment they have appealed. The note offered by the plaintiffs ought to have been received in evidence; the supplemental and original petition are to be taken as one and the same proceeding; and it is well settled in our courts, that when a document or note is annexed to the petition, a variance between it and its description is not fatal, and that the note or document must govern. 3 *Martin*, 644. 6 *Martin N. S.*, 128. 7 *Ibid. N. S.*, 228.

The original and supplemental petition are to be taken as one and the same proceeding. Any variance between a note or document annexed, and the description of it in the petition is cured by the note or document when offered in evidence, which must govern.

Besides this, after the answer of the defendants to the supplemental petition, and their admission that the note sued upon had been duly protested and belonged to the plaintiffs, it was too late to contest its identity. If the admissions and interrogatories of the defendants were made in reference to another note, it was incumbent upon them to show that another existed.

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VS.
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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided and reversed, the exception overruled, and the case remanded to be proceeded in according to law, with directions to the judge not to reject the note offered in evidence, on account of any variance between said note and the description given of it in the original petition. It is further ordered, that the defendants and appellees pay the cost of this appeal.

HUBBELL VS. CLANNON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

In judicial proceedings, when the contrary is not shown, or does not appear, the presumption is that they were regular.

Where the judgment expresses that it was confirmed and made final on *due proof of the plaintiff's demand*, it is sufficient grounds according to article 315 of Code of Practice.

The neglect of the clerk to record the judgment cannot authorize its reversal.

A judgment becomes final *three days after* its rendition, although prematurely signed.

The maker of a note cannot complain that judgment was not rendered against him and the endorser *in solido*, even when they are both sued.

Damages as for a frivolous appeal will be given when the points relied on by the appellant are untenable and frivolous.

This is an action against the maker and endorser of a promissory note. On making judgment by default final, it was confirmed against the maker alone. He appealed, and assigned various grounds as error apparent on the face of the record and proceedings.

Jones, for the plaintiff.

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G. B. Duncan, for the appellant.

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CLANNON.

Martin, J., delivered the opinion of the court.

The defendant and appellant assigns the following as errors apparent on the face of the record :

1. It does not appear that three judicial days elapsed between the judgment by default, and the final judgment.

2. The judgment by default does not express the grounds upon which it was rendered.

3. The judgment is not countersigned by the clerk of the court, nor does it appear that it was ever recorded in the record book, required by law to be kept for that purpose.

4. It appears that the judge signed the final judgment on the same day on which it was rendered, contrary to law.

5. It does not appear that the deposition on which judgment was confirmed was taken in open court, or that the defendant had notice of the time and place at which it was to be taken.

6. The petition prays judgment against two persons *in solido*, alleging them to be thus liable ; yet it does not pronounce the defendant Clannon liable *in solido*, which is never presumed ; and it is given against him for the whole amount claimed.

I. The judgment by default was taken on the 12th of February, and made final on the 18th. Nothing shows that three of the intervening days were not judicial days. One of them, however, must necessarily have been Sunday. In judicial proceedings, the rule is, that when the contrary does not appear, the presumption is that they were regular. It is also a matter of public notoriety that the Parish Court sits every day in the week at the time of year when this judgment was rendered.

In judicial proceedings, when the contrary is not shown, or does not appear, the presumption is that they were regular. Where the judgment expresses that it was confirmed and made final on due proof of the plaintiff's demand, it is sufficient grounds according to article 315 of the Code of Practice.

II. The judgment expresses that it was confirmed and made final "on due proof of the plaintiff's demand;" and the 315th article of the Code of Practice, cited by the appellant, positively declares that this is sufficient.

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SUBBELL

vs.

CLARKSON.

The neglect of the clerk to record the judgment cannot authorize its reversal.

A judgment becomes final three days after its rendition, although prematurely signed.

The maker cannot complain that judgment was not rendered against him and the endorser *in solido*, even when they are both sued.

Damages as for a frivolous appeal will be given when the points relied on by the appellant are untenable and frivolous.

III. We are ignorant of any law that requires the clerk to countersign any judgment. We are bound to believe that clerks of courts record all judgments rendered therein, until the contrary be proved. But their neglect in this particular, whatever might be its consequences in other respects, cannot authorize the reversal of a judgment.

IV. This court decided, in the case of *Gardere et al. vs. Murray, 2 Martin, N. S., 244*, that a judgment became final three days after its rendition, although it had been prematurely signed.

V. The deposition appears to have been taken on the very day the judgment was confirmed, and the *jurat* is subscribed by the clerk; hence the presumption is that it was sworn to in open court; for otherwise the *jurat* must be subscribed by the magistrate who received the deposition.

VI. The defendant and appellant was the maker of the note sued on; his co-defendant was the endorser; he therefore cannot complain that judgment was given against him for the amount of the note, and not against him and the endorser *in solido*. This does not place him *in dupli*, for the liability of the endorser results only from the default of the maker; and he may recover from the latter if judgment be taken against both, and satisfy it out of the endorser.

Damages have been asked as for a frivolous appeal. There can hardly be better evidence of the frivolity of the appeal, than the untenable points made by the counsel for the appellant in this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts, and five per cent. damages.

ATCHAFALAYA BANK *vs.* DAWSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

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ATCHAFALAYA
BANK.
vs.
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To enforce the forfeiture of the charter of a corporation, proceedings must be instituted to that effect by the state, and unless the power of instituting such proceedings be expressly delegated by law, *the state alone possesses it*, and having this power, may forbear to exercise it, and waive the forfeiture.

A charter granted by a state does not become absolutely null by the inexecution of the condition attached to it. A cause of forfeiture cannot be taken advantage of, or enforced against a corporation incidentally, or in any other mode than by a direct proceeding, *instituted by the government*; because it may waive a broken condition of a contract or charter, as well as an individual.

The clause in the bank charters of this state, which declares that in case of a suspension of specie payments for more than ninety days, the "charter shall be *ipso facto* forfeited and void," gives to the *state the right to claim the forfeiture*, in an action instituted for that purpose; and although the bank may have forfeited its corporate life, it continued to live as long as the state did not claim the forfeiture.

Martin, J.—The legislature possessed the power to remit any forfeiture that resulted to the bank charters, by the suspension of specie payments; and the exercise of that power in the act for the relief of the banks, approved March 14, 1839, relieves them from all penalties incurred by the *non-payment* of specie.

This is an action against the endorser of a promissory note, discounted at the branch of the Atchafalaya Bank, established at Monroe, in the parish of Ouachita. The defendant resides in the state of Mississippi, and this suit was instituted by attachment in the District Court at New-Orleans, the 2d March, 1838.

The defendant appeared by counsel, and put in an exception denying the right and power of the plaintiff to sue and maintain this action, because said plaintiff can no longer use its corporate name or privilege; the bank having suspended

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and refused the payment of its notes, bills, obligations and moneys received on deposit, in lawful money of the United States, for more than ninety days antecedent to the present action, by which suspension and refusal the charter became, *ipso facto*, forfeited, &c.

Upon this exception, the cause was tried in the court below.

It was admitted the bank had suspended specie payments for more than ninety days previous to the institution of the present suit.

The 21st section of the bank charter, passed and approved the 10th March, 1835, declares, "That the said company shall not at any time suspend or refuse payment in lawful money of the United States, of any of its notes, bills, obligations, or any money received in deposit, &c.; and if it shall at any time suspend or refuse payment as aforesaid, the holder of such note, bill or obligation, &c., shall be entitled to demand and receive interest thereon, from the time of such suspension or refusal, until the same shall be fully paid, at the rate of twelve per cent. per annum."

Sec. 22. "That no dividend shall be made during any such suspension or refusal of payment; and if any such suspension or refusal of payment shall continue for *more than ninety days*, this charter shall be, *ipso facto*, forfeited and void."

The legislature passed a law the 14th March, 1839, after the rendition of the judgment in the court below, remitting and relieving the banks from all forfeitures on account of the suspension of specie payments.

The district judge came to the conclusion that the case, provided for in the 22d section of the act of incorporation or charter, had happened, that the self-destroying provision therein contained, had become operative, and that the corporate existence of the plaintiff had legally ceased.

Judgment was rendered sustaining the exception, and the Bank appealed.

Hoffman, for the appellant. Whether the plaintiff has or

not conformed strictly to the provisions of the charter, cannot be inquired into incidentally and collaterally. EASTERN DIST.
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2. No such inquiry can be gone into, except at the suit of the state, or power granting the charter.

3. The evidence does not justify the conclusion to which the inferior court has come. See *Angell* and *Ames* on Corporations, and the plain principles of the jurisprudence of every country.

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Josephs, for the defendant. Corporations may be dissolved by mis-user or non-user, and when the condition of the grant or franchise is broken, it forfeits the whole charter or franchise. 4 *Comyn's Digest*, 499. G. 2, *Verbo Franchise*.

2. Corporations may be dissolved in various ways, and is regulated in the different states by special enactments, and sometimes by a general law, or by a provision contained in the charter itself, as in the case of the *Bank of Niagara vs. Johnson*, 8 *Wendell's Reports*, 654. *Slee vs. Bloom et al.*, 19 *Johnson*, 464. 20 *Ibid.* 669. 8 *Cowen's New-York Reports*, 396.

3. The Louisiana Code, under the title of Corporations, contains all the law we have on the subject, and which subjects charters and acts of incorporation to the general rules for the interpretation of agreements between individuals. *Louisiana Code*, 419, 424, 431, 438.

4. In the present case, the plaintiff has been created an artificial being, clothed with certain rights and powers; among others, that of bringing suit, and its whole existence depends upon the performance of certain conditions and stipulations. But in case it shall fail to comply, that is, suspend payment of its notes in specie for more than ninety days, this charter shall be, *ipso facto*, null and void. This failure to perform a condition specified, operates, *ipso facto*, a dissolution of the charter. *Louisiana Code*, 13-19, 1941, 1946.

5. Even at common law the legislature does not possess the power of remitting a cause of forfeiture of this kind. The doctrine of waiver is not applicable when by the terms

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of the grant or charter, the estate or franchise absolutely determines upon failure to perform a condition. *The People vs. Manhattan Company*, 9 *Wendell's Reports*, 351, 382-3.

6. In this case a peremptory exception was filed, putting at issue the capacity and power of the plaintiff to sue. By our laws the defendant possesses this right in every case, before answering to the merits, and if he is incapable or unauthorized, he must fail. What can be clearer than that the bank, having forfeited its very existence as a corporation, is defunct and incapable of standing in judgment, either as plaintiff or defendant. See *Benjamin and Slidell's Digest, verbo Practice*, page 309, and authorities there cited.

The judges delivered their opinions *seriatim*.

Eustis, J.—The Civil Code of Louisiana provides, by the article 438, for the dissolution of corporations, first, by an act of the legislature in the cases and on the conditions provided; and secondly, by forfeiture, when the corporation abuses its privileges or refuses to accomplish the condition on which they were granted, in which case *the corporation becomes extinct by the effect of the violation of the conditions of the act of incorporation*.

It would certainly be difficult to find in our language stronger terms, or to combine them with more force, for the purpose of expressing the consequences of an act. *The corporation becomes extinct* by the effect of the act or the neglect. Without any provision in the charter of a corporation, it becomes extinct by the operation of law, by the effect of the violation of the conditions. It is provided by the act of incorporation of this bank, that on the suspension or refusal of payment in specie for more than ninety days, the charter shall be, *ipso facto, forfeited and void*. The difference between this proviso and the law, as to its meaning, operation and effect, consists in the difference between Latin and English. If either be more positive, it certainly is the text of the code; by that, the corporation becomes *extinct*; by the act of incorporation, the charter is *forfeited and void*: in one, *by the effect*

of the act; in the other, *ipso facto*. I do not understand the words, *ipso facto*, as having any other import than the corresponding terms, *by the effect of the act*, made use of in the code. But this is mere verbal criticism. Have they any other legal import? Is there any legal effect flowing from the one, which does not necessarily follow from the other? I think not. If the forfeiture in this case was on a different footing from any other, it is very singular that the legislature should not have expressed their sense clearly to that effect, and not have left a consequence like this to be inferred by implication. Had the word immediately, or any corresponding term been used, had the incapacity to sue, afterwards, been declared, and had provision been made for the preservation of the property, which by this forfeiture is left in a manner unprotected, even by the laws, a very different case would have been presented to us.

The state has a large interest in the banks of this city. On its credit, the capital of five of them having the largest capitals has been provided, for which the state is bound to the holders of its bonds. Independent of the interest which any citizen has in a sound currency, the state has an immense pecuniary interest in maintaining the credit of its banks, which in point of fact furnish the currency of the country. These matters are constantly the subject of legislative care. The attention of the legislature and the people, is directed to them often with fearful anxiety. The connection of the banks with each other, is immediate and inseparable, under the system which has existed by law in this state. It is requiring too much from human credulity to suppose that it was the intention of the legislature to subject the currency of the country to the caprice of a debtor; to render the charter of one bank null and void, for an act which other banks could do with impunity, and when the inevitable consequence would be bankruptcy to all of them, and prostration of the credit of the state. I cannot adopt a construction which would lead to such consequences, *merely by implication*, because I am satisfied that nothing was further from the intention of the legislature, than to produce them.

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It must be remembered that no provision has been made by our laws, for the administration of the property of corporations whose charters become forfeited. Whether, on the forfeiture, the property is vested in the several corporate members or copartners, or whether the state has any interest in the real or personal estate, it is now unnecessary to determine. It is clear, from an examination of various provisions of this charter, that no forfeiture was anticipated by the legislature, necessarily to result from a suspension of specie payments on the part of the bank.

In the 21st section, a penalty of twelve per cent. per annum, is imposed in favor of the holders of any notes or obligations of the bank, on the refusal to pay them in lawful money of the United States. If the bank should be incapacitated at the time from collecting its debts, and had no legal existence to enable the party holding a note to sue directly for his debt, the recovery of the penalty, or even the principal, would, under any circumstances, be so difficult and expensive as to render this clause nugatory.

The 22d section provides, that no dividend shall be made during any suspension of specie payments. The term *dividend* supposes the existence of the bank, and if the bank should be extinct in law, what control could the legislature have over the *property which stockholders might hold in their individual right*, as to the division of their profits among themselves?

By the 27th section, at the expiration of a remote term, the rail road and turnpike road to be constructed by the bank, with all the warehouses, buildings, engines, waggons and machinery thereto appertaining, revert to the state. Can it be supposed that this right can be defeated at the instance of a debtor to the bank, in a suit against him by the bank to recover a debt lawfully contracted? And that the state has no right to forbear to insist on a forfeiture of the charter, when a right stipulated *expressly* in favor of the state, might be destroyed by the forfeiture, and would be rendered available by the continuance of the charter? Having no doubt as to the intention of the

legislature, none as to the general purport and intentment of the act, and thinking that the expressions used in the charter do not take the case out of the ordinary laws concerning the dissolution of incorporations, it must be considered with reference to them.

The functions of the different branches of our state governments, under their constitutions, have been settled in the different states, and a jurisprudence has been formed in relation to them, which must be considered as the settled law of the land. In reference to this system, we must examine and construe the charters of our corporations, and all grants involving municipal or corporate powers. Our code provides that corporations may be dissolved by *forfeiture*. That term necessarily implies the action of the judicial power when used in relation to corporate franchises. In what manner and at whose instance is the forfeiture to be decreed? Can it be decreed incidentally, or can a forfeiture be pronounced in a suit between a corporation and one of its debtors? These are questions which remain to be considered.

To enforce the forfeiture of the charter of a corporation, proceedings must be instituted to that effect by the state, and unless the power of instituting such proceedings be expressly delegated by law, the state alone possessed it. The state having this power, may forbear to exercise it and waive the forfeiture. Until the forfeiture is judicially decreed, neither the forfeiture nor the cause can be inquired into in another suit, nor can the existence of the corporation be questioned incidentally or collaterally. Such we take to be the established jurisprudence on this subject. 2 *Kent's Commentaries*, 212 and seq. *Angell and Ames on Corporations*, page 510, and cases there cited. The research of counsel and our own inquiries, have not furnished us with a single case in which these principles have not been admitted. Our attention has been directed to two cases, decided in New-York, which are not considered as affecting in any manner these principles which are established by an unusual concurrence of decision, considering the scrutiny to which the rights of corporations are subjected, and the different views enter-

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tained in different parts of the Union, as to the extent and policy of their privileges. The case of *Slee vs. Bloom and others*, reported in 19 *Johnson*, 473, was an action by a creditor against the corporators to render them personally liable for the debts of the corporation, and was determined in relation to the right of the creditor. It was predicated on a *voluntary surrender of the corporate rights* of the corporation, on its having ceased to own any property, and from doing any one act manifesting an intention to resume its corporate existence. The case of *Briggs vs. Penniman*, 8 *Cowen's Reports*, 396, is of the same character. Both of these cases arose under a statute of New-York, relating to corporations for manufacturing purposes, and the charters were held to be dissolved within the act, so as to give a remedy to creditors. In the case of the Bank of Niagara against Johnson, 8 *Wendell's Reports*, 654, the Supreme Court of the state of New-York, give it as their opinion, that if the corporation whose existence was drawn in question in the case of *Slee vs. Bloom and others*, had instituted a suit against a debtor of the corporation, the action would have been maintained. I think that there is nothing in this charter which creates, under our laws, a disability on the part of the corporation to maintain an action for the recovery of a debt.

If the charter under consideration be considered as a contract between the state and the stockholders, by which certain privileges and exemptions are given to the latter, in consideration of the advantage resulting to the public from the construction of a rail road from the Mississippi to Opelousas, and of the reversion of the road with its establishments at the expiration of a certain term, and if this contract has been violated, it certainly would be a matter of common justice, that the party most interested in its being continued in operation, should have the right to be heard in relation to its dissolution; and that the important rights resulting from the contract should not be divested and lost in a suit to which the state is not and cannot be a party. The fate of contracts of this description, rests on a frail foundation if such be the law.

The act of the 14th of March, 1839, for "the relief of such of the banks whose charters may have been forfeited by a suspension of specie payments, from such forfeiture," appears to have been passed in conformity and with reference to what may be considered as the settled law of the land on this subject. The forfeiture was incurred, and it was remitted by the state, in whose favor it enured, and who alone had the power to enforce or remit it. This is the only sense in which the act is to be received. This act remitting the forfeitures, in general terms, to such of the banks as may have incurred them, necessarily excludes the idea of their non-existence as corporations.

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I, therefore, conclude, that the exceptions made by the defendant to the capacity of the plaintiff to sue and maintain this action, be overruled, and that the cause be remanded for further proceedings. The appellee to pay the costs of the appeal.

Rost, J.—The plaintiffs, being a corporation established in the state of Louisiana, and endowed with banking privileges, seek to recover from the defendant the amount of a promissory note, discounted by them for his benefit.

The defendant excepted to the action, on the ground that the plaintiffs had suspended the payment of their obligations in gold or silver, and that said suspension had continued for more than ninety days at the time of the inception of this suit, whereby their charter was forfeited, *ipso facto*, and they had no corporate capacity to appear in court or to stand in judgment. The fact of the suspension of specie payments being admitted, the District Court sustained the exception and the plaintiffs appealed.

In order that the question at issue may thus be collaterally inquired into, it is necessary that the charter of the plaintiffs should have become an absolute nullity by the inexecution of the condition on which it had been granted; for as long as it had a vestige of existence left, the condition imposed by it on the corporation, to pay their debts on demand, under

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the penalty of interest at the rate of twelve per cent. per annum, implies an indefeasible right to collect from their debtors, the means with which alone these debts could be paid. The power to collect the means of paying is antecedent to the obligation to pay, and cannot, in law or good conscience, be separated from it; take that power away, or place difficulties in the exercise of it, which will render it unavailing, and the obligation must cease.

It is, then, necessary to examine whether the suspension of specie payments for more than ninety days, rendered the charter of the plaintiffs absolutely null. I feel no disposition to go at length into the investigation, whether, generally speaking, a charter granted by a state becomes absolutely null by the inexecution of the conditions attached to it; the uniform current of judicial decisions in this country has settled that it does not: that a cause of forfeiture cannot be taken advantage of or enforced against a corporation, collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose, and that the government creating it can alone institute such a proceeding, since it may waive a broken condition of a contract made with it, as well as an individual. *Angell & Ames on Corporations*, 510; *2 Kent's Commentaries*, 312; *9 Cranch*, 292.

But the counsel for the defendant contends, that although this rule may generally be correct, the legislature have power to say that, if a chartered bank suspends specie payments for more than ninety days, the charter shall ever after be a nullity, of which any one may take advantage, and that they have said so in this instance, by providing that, on the happening of that fact, the charter of the plaintiffs shall, *ipso facto*, be forfeited and void. The words *ipso facto*, it is said, are not generally found in charters; they must amount to something, and therefore they amount to a final judgment of forfeiture. It need not be pronounced at the suit of the state; it exists, *ipso facto*, for the common advantage of all. The premises of this argument may or may not be true, but the conclusion is undoubtedly false.

If other charters do not contain the words *ipso facto*, they

all contain others of similar import, when they are granted upon conditions. Article 438 of the Louisiana Code provides that charters shall be forfeited, when corporations shall refuse to accomplish the conditions on which they were granted; in which case, says the code, the corporation becomes extinct by the effect of the violation of the conditions. This is the general law applicable to all corporations; the language in which it is written appears to me as strong as *ipso facto* or any other words, Latin or English, could make it; and I cannot conceive how the same legal disabilities should not attach in both cases, after the inexecution of the conditions.

In trying to ascertain the meaning and intent of the legislature, the mutual connection and *quasi* solidarity of all our banking institutions, as well as the vital interest which the state has in those who have raised their capital upon its bonds, must be kept in view, and courts of justice are bound to presume that the legislature have retained in their own hands the power necessary to the protection of the public interests, and that they have not so far betrayed their trust as to place, in any event, the honor and the credit, the peace and the prosperity of the state, at the mercy of any dishonest debtor who may choose to defraud a bank out of what he justly owes.

If the charter of the plaintiffs became an absolute nullity, and their debtors have the right to inquire collaterally into the forfeiture, that right exists for all and each of them. It is as perfect for a debt of twenty dollars as for one of twenty thousand; so that, on all claims under three hundred dollars, a judgment without appeal to this court might be rendered by a parish judge, or even by a justice of the peace, the effect of which would be to shake to its foundation the currency of the country, to destroy the plaintiffs, to ruin the credit of all the other banks, and probably to render the state liable to pay at once the millions of bonds which it has issued for their benefit. These consequences are too serious to be inflicted upon the country by a forced construction of the words *ipso facto*. The complaints made against banks

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are often just, in relation to the few individuals who manage, or mismanage them. I am no advocate of the system, but the many who own the stock are generally free from all blame, and the earnings of honest industry thus invested are not to be wantonly sacrificed. It may have been impolitic and unwise to grant the charters, but the legislature, in granting them, contracted the obligation to protect the private interests which were to arise under them.

Again, if the charter became an absolute nullity by the mere fact of the suspension, it would be so, independently of the causes of that fact, and unforeseen accidents or overpowering force would create no exception in favor of the plaintiffs; the naked fact of the suspension of specie payments for more than ninety days, could alone be inquired into upon the issue. Let the bank be robbed of all its means by main force; let its vaults be emptied, and the proof of all its credits be obliterated and destroyed by an invading army; no judicial inquiry could extend beyond *ipsum factum*, and proof of that isolated fact would in all cases alike create the disability.

Unless the legislature had expressly said, that, upon the happening of the suspension during more than ninety days, the nullity of the charter would be absolute, and any one might take advantage of it, collaterally or otherwise, I cannot give to their acts a construction which would take away from them all power to protect the interests and the currency of the state when they most require protection; indirectly lead to the violation of constitutional rights, and mete out the same punishment to gross negligence and unavoidable misfortune. The ground assumed in argument, that a corporation must be viewed in all things as an individual, and that the charter, in this instance, is nothing more than a contract with a resolatory condition, and subject to the law of contracts, cannot avail the defendant. The condition in that contract was to be performed by the bank; and article 2042 of the Louisiana Code expressly provides, that when the condition is to be performed by either party, the contract is never dissolved of right, but the dissolution must be sued

for, and the party in default may, according to circumstances, have a further time allowed him for the performance of the condition.

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If the charter of the plaintiffs had become void for every thing else, it must, from the necessity of the case, have continued to exist for the purposes of liquidation, because the legislature made no provision in the charter for the settlement of the affairs of the corporation in any other manner. The right to use the corporate name for the purposes of liquidation, is all that the plaintiffs require to maintain their action; but I am of opinion that, notwithstanding the words *ipso facto*, the only effect of the suspension of specie payments by the plaintiffs was to give the state the right to claim the forfeiture, in an action instituted for that purpose. Nothing thereafter, but the will and pleasure of the legislature, could prevent or retard the exercise of that right; but if, from motives of expediency, it was not exercised, the corporation went on to accomplish the purposes of its creation, and was entitled to the protection of the laws. Although it might have forfeited its corporate life, it continued to live as long as the state did not claim and obtain the forfeiture; and as it has since been waived, there has been no interruption in its existence.

The clause in the bank charters of this state, which declares that in case of a suspension of specie payments for more than 90 days, "the charter shall be *ipso facto* forfeited and void; gives to the state the right to claim the forfeiture in an action instituted for that purpose; and although the bank may have forfeited its corporate life, it continued to live as long as the state did not claim the forfeiture.

The legislature have shown their intendment of the condition of the charter, by the course they have since pursued; they have, in general terms, reinstated all the banks of the state in all the powers, rights and privileges conferred upon them by their respective charters, notwithstanding any forfeiture thereof, to the same extent as if no such forfeiture had ever existed. If they had considered that the charter of the plaintiffs was an absolute nullity, that relief would have been insufficient for them; they would have required a special act, giving them a new charter, or at least reviving the old one, section by section, and their officers would all have been re-appointed. The fact that all the banks were embraced in one common measure of relief, shows that the legislature was of opinion that the suspension of specie payments had placed them all in the same situation, whether or not their charters were to be forfeited *ipso facto*.

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I am satisfied that the plaintiffs had capacity to maintain their action, and that the judgment of the District Court must be reversed, the exception of the defendant overruled, and the case remanded to be proceeded in according to law.

Martin, J., presiding.—When the banks of this city first suspended their payments in specie, in 1813, I happened to be the officer on whom devolved the responsibility of determining whether a forfeiture of their charters resulted from this circumstance; and if it did, whether it was the interest of the state to avail itself of it.

It is unimportant that I should state the conclusion I came to on the first proposition.

On the second, I thought it would be imprudent in me to provoke a judgment against the banks, as it would render it necessary that measures should be taken to effectuate a liquidation—measures which could more properly be provided by the legislature than the courts of justice. I therefore waited for the meeting of the legislature, when I was relieved from all responsibility on this head by a promotion to a seat in this court. The gentleman who succeeded me and still filled the office of attorney general, when the banks for the second time suspended specie payments, appears to have been of opinion that this circumstance did not authorize, or, at least, did not require his official interference. Public opinion has powerfully manifested itself in favor of

Martin, J.—The legislature possessed the power to remit any forfeiture that resulted to the bank charters by the suspension of specie payments; and the exercise of that power in the act, for the relief of the banks, approved March 14, 1839, relieves them from all penalties incurred by the non-payment of specie.

the conclusion he came to. The legislature in the years 1815, 1838 and 1839, sanctioned the conduct of the law officers of the state. At the last session, to put the question at rest, a law was passed "to relieve such of the banks of this state, whose charters may have been forfeited by a suspension of specie payments, from such forfeiture." The first section of this act provides, that such of the banks of this state as may have forfeited their charters by a suspension or refusal of the payment of their notes or obligations in specie at any time prior to the passage of this act, are hereby declared reinstated in all the powers, rights and privileges conferred upon them by their respective charters, notwith-

standing any forfeiture thereof, to the same extent as if no such forfeiture had ever existed. In the meanwhile, the defendant in the present case, raised the question of forfeiture in the court of the first district, by an exception to the capacity of the plaintiffs to stand in judgment by their corporate name. The exception was sustained and the suit dismissed.

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It has appeared to me absolutely unnecessary to test the correctness of the decision of the District Court, because, admitting that it was consonant to law at the time it was pronounced, it becomes our duty to reverse the judgment; the law having been changed since its rendition. In the case of the *State vs. Johnson et al.*, 12 *Louisiana Reports*, 547, this court held, "that when an act creating an offence is repealed, even after judgment in the inferior court, the judgment must be reversed." In that case, it is true, the act had been absolutely repealed. In the present, it has not been done, but it remains in full force for the future; its effect, however, on past transactions, is absolutely destroyed.

I do not wish it to be understood, that the fact of my having taken a different view of this case, from the other members of the court, is to be considered as a dissent from their opinions; I only consider the ground of the forfeiture having been remitted by the act of the legislature under consideration, as sufficient upon which to rest the decision of the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; the defendant's exception overruled and the case remanded for further proceedings according to law, the appellee paying the costs of the appeal.

cashier, he was bound to pay the bill, and promised to pay it.

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Under these circumstances, the district judge considered the defendant bound, and gave judgment for the amount of the bill.

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The defendant appealed.

T. Slidell, for the plaintiff.

Clarke, for the appellant.

Eustis, J., delivered the opinion of the court.

This is an action against the endorser of a bill of exchange. The bill was protested for non-payment, and due notice of protest was not given to the defendant. The bill was payable in Mobile; the defendant resides in New-Orleans, and the notice of protest was sent to New-York, and was not given to the defendant in season to bind him; however, he afterwards declared to the clerk of the Bank of the United States, in New-Orleans, that he was bound to pay the bill, and promised to pay it. We necessarily infer, from the circumstances disclosed in evidence, that he was apprised of the irregularity in the communication of the notice at the time of his acknowledgment of his obligation and subsequent promise to pay it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MAGOFFIN vs. STRINGER ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-
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In the probate sale of a slave to pay the debts of a succession, where the executor expressly declares he does not warrant against any of the redhibitory vices or maladies prescribed by law, the purchaser cannot avail himself of the redhibitory vice in the slave of an habitual runaway, to avoid the sale and payment of the price, even if this fact was known to the owner in his lifetime, and not declared.

This is an action on a promissory note given for the price of a slave, adjudicated to the defendant Stringer, at the probate sale of the succession of W. W. Wright, deceased.

The executor made it publicly known that the slave was sold to pay the debts of the succession, and without warranty.

The defendants, in avoidance of the sale and payment of their note, pleaded the redhibitory vice of a runaway in relation to the slave, which they aver he was affected with to the knowledge of the owner in his lifetime.

There was judgment for the plaintiff, and the defendants appealed.

Wharton and Castera, for the plaintiff.

Lockett, contra.

In the probate sale of a slave to pay the debts of a succession, where the executor declares he does not warrant against any redhibitory vices or maladies prescribed by law, the purchaser cannot avail himself of the redhibitory vice in the slave of a habitual runaway, to avoid the sale and payment of the

Rost, J., delivered the opinion of the court.

The defendants, sued as maker and endorser of a promissory note, for the price of a slave sold by order of the Court of Probates, as part of a succession to pay the debts thereof, pleaded that the slave was addicted to running away, in the lifetime and to the knowledge of the deceased, and that this circumstance was not made known at the time of the sale. There was a verdict and judgment against them, and they appealed.

The sale made by the executor, in conformity with the adjudication, stipulates expressly that he does not warrant

against any of the vices, maladies and defects, prescribed by law. It is admitted that the slave was sold to pay the debts of the succession ; and the fact that the deceased had knowledge of his redhibitory vices, cannot, if it was proved, affect the validity of the sale made by his executor after his death, without warranty. The judgment of the district court, and the verdict upon which it was given, were well founded in law, and the judge did not err in neglecting the testimony offered.

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price, even if
this fact was
known to the
owner in his
lifetime and not
declared.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

The deposition of a witness, taken before a commissioner, who was twice examined and cross-examined by the defendant, *without objection*, will not be rejected on the trial, at the instance of the latter, on the ground that the witness was incompetent to testify.

The exception of domicile should be first acted upon, before swearing the jury to try the issue, if the party is desirous to avail himself of it.

It is the duty of masters of steam boats, as soon as a slave is discovered on board without permission, to cause him to be landed or secured.

So, where a slave was discovered on board, without permission, soon after the defendant's boat started from the port of New-Orleans, and was allowed to be employed by the cook, without any measures taken for securing him, and he was lost on the trip or voyage, the master is liable to the owner for his value.

Interest cannot be allowed on an unliquidated demand.

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This is an action to recover the sum of six hundred dollars, the value of a slave, which the plaintiff alleges the defendant illegally took on board the steam-boat Lady Washington, which he commanded, and carried him out of the state, by which he was entirely lost, as he has never returned. The plaintiff alleges that he is the owner of said slave; that he is worth six hundred dollars, and that the defendant is liable, by reason of his illegal conduct, to pay his value; for which he prays judgment.

The defendant excepted, and alleged that he was domiciled in the parish of Natchitoches and could only be sued there. On the merits, he pleaded a general denial.

On these pleadings and issues, the cause was tried before a court and a jury.

On the trial, and after the plaintiff had closed his testimony, the defendant offered evidence to show that his residence or domicil was in the parish of Natchitoches, which was opposed by the plaintiff's counsel, as being waived by proceeding to trial on the merits, and it was rejected by the court. The defendant took his bill of exceptions.

Other objections were made, and questions of law raised by the parties, which, together with all the material facts of the case, are stated in the opinion of the court, which follows.

The jury returned a verdict of six hundred dollars for the plaintiff; and from judgment confirming their verdict, and allowing interest, the defendant appealed.

Roselius, for the plaintiff.

Preston, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment which condemns him to pay the value of a slave of the plaintiff, taken on board of the steam-boat of which the former was master, without the consent of the latter, the slave having fallen overboard.

The facts of the case are these: the slave, who is stated in

the petition, to be a boy about thirteen years of age, went on board of the boat unperceived by the defendant, on a trip from New-Orleans to Natchitoches, in company with a sister of his, a connection of the wife of the cook, who, discovering the boy about an hour after the boat left the city, took charge of him as an acquaintance, and employed him as an assistant in the cook's room. The boy was not concealed, and at times carried dishes from the cook's room to the table in the cabin. He was missed from on board after the boat had proceeded several miles above Bayou Sara. It was supposed he had been drowned by falling overboard. A boat was sent in search of him, but in vain.

Our attention is directed to a bill of exceptions taken to the admission of the deposition of William Brown, a black man, on the ground that he must be presumed to be a slave; and there was no evidence of his freedom, except a part of his deposition, in which he avers he was free, and had free papers. The court overruled the objection, on the suggestion that it was taken too late at the trial, and ought to have been made before the commissioner.

It does not appear to us the court erred, although the reason given for overruling the objection would not, perhaps, have been sufficient; but the witness was examined twice, and cross-examined on the part of the defendant, who, in our opinion, ought not to be permitted to repudiate testimony of which he had sought to avail himself.

A second bill of exceptions was taken to the refusal of the judge to receive evidence in support of a plea to the jurisdiction of the court, on the ground of the residence of the defendant out of the parish in which he was sued; the court being of opinion that the plea was waived, and, after argument, rejected by the court.

We understand that the court meant that the plea was waived by the defendant's neglect to provoke the action of the court on it, and proceeding to trial upon the merits before a jury sworn to try the issue, and that, therefore, the court rejected it. It does not appear to us the court erred.

A third bill was taken to the refusal of the court to charge

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So, where a slave was discovered on board, without permission, soon after the defendant's boat started from the port of New-Orleans, and was allowed to be employed by the cook, without any measures taken for securing him, and he was lost on the trip or voyage, the master is liable to the owner for his value.

The deposition of a witness taken before a commissioner, who was twice examined and cross-examined by the defendant without objection, will not be rejected on the trial, at the instance of the latter, on the ground that the witness was incompetent to testify.

The exception of domicile, should be first acted upon, before swearing the jury to try the issue, if the party is desirous to avail himself of it.

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the jury, that the 5th section of the act of the 13th of February, 1816, relied on by the plaintiff, was not applicable to the master of a boat running entirely in the state, and only to slaves concealed on board: the court refused to instruct the jury as requested, but charged them, that it was the duty of a master running entirely in the state to cause his vessel to be searched before leaving port, and the moment he discovered a slave, to cause him to be landed or dealt with as required by the said section. The act cited was expressly enacted to prevent the transportation of slaves out of the state. This may almost as well be effected by steam-boats approaching the line of the state of Mississippi, on the left bank of the river, as is done by boats running into Red river, as by those who run up the river above that line. It does not, therefore, appear to us, that the injunction to masters of steamboats who discover concealed slaves on board, to land them as soon as possible, is applicable to this case.

The court, therefore, did not err in refusing to say that the 5th section of that act which contained this injunction is inapplicable to boats running within the state. This section relates only to *concealed* slaves; but the proviso in the first section of said act creates a presumption that all slaves found on board are received or *concealed* for the purpose of being carried out of the state, unless the presumption be removed by the party accused. We are ignorant of any law that requires the master of a steam-boat to cause her to be searched before her departure, for concealed slaves; but we concur with the judge *a quo* in the opinion, that it is the duty of a master of a boat, as soon as he discovers a slave on board, to cause him to be landed or secured.

It is the duty of masters of steam-boats, as soon as a slave is discovered on board, to cause him to be landed or secured.

Steamboats offer such facility to the escape of slaves, that as soon as the master of a boat discovered that his vigilance had been eluded, and that a slave had come on board against the will of his owner, he ought to take measures for his detention and return. In the present case, the cook, for whose conduct the master is responsible, employed the plaintiff's slave, without taking any measure for securing him. It does not appear to us that the verdict is incorrect in

charging the defendant with the value of the slave ; but the jury and the court, in our opinion, erred in allowing interest thereon.

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It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of six hundred dollars, with costs in the court below, and that he pay those of the appeal.

OAKLEY ET AL VS. DUCKER.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In an attachment case, commenced in the Parish Court of New-Orleans, where the defendant died during the pendency of the suit : *Held*, that the power of the court of general jurisdiction ceased, and the cause was ordered to be transferred to the Court of Probates for the parish in which the succession was opened.

The succession of a *non-resident*, dying in this state, is opened in the parish where he owned real estate ; or in the parish in which his principal effects are situated, if he had effects in several parishes ; or in the parish where he died, if he had no immoveable property in the state.

All claims for money must be brought in the Court of Probates for the parish in which the succession is opened, whether the deceased had his residence in the state, *or out of it*.

Eustis, J., dissenting : Did not consider a mere auxiliary administration in a remote parish, of the estate of an intestate, domiciliated out of the state, but dying in it, leaving *moveable* property under attachment in our courts of general jurisdiction, *divested* them of that jurisdiction.

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This suit commenced by attachment. The plaintiffs attached one hundred and thirty-two bales of cotton, the 31st May, 1837, as the property of the defendant, who, it was alleged, resided in the state of Mississippi. The debt sued on was evidenced by a promissory note signed by the defendant, for four thousand seven hundred and thirty-three dollars and seventy-six cents, payable the first day of April, 1837, at the Commercial Bank of Rodney, in the state of Mississippi.

The defendant's counsel took a rule to have the attachment set aside, and on the 23d June filed an answer, averring, that the defendant was a citizen of Louisiana, residing in the parish of Concordia, and that no attachment writ could issue. He prayed that the suit be dismissed.

On the 21st November it was suggested to the court, that the defendant had died since the institution of suit, leaving his daughter, Sarah Ann Ducker, a minor, as his only heir; whereupon a curator *ad hoc* was appointed to represent said minor, who was made a party to the suit.

The curator *ad hoc* excepted to the jurisdiction of the Parish Court, and suggested, that the succession of the defendant was opened in the parish of Concordia, and E. Sparrow appointed curator of absent heirs and administrator of the estate; that the Probate Court of that parish has exclusive jurisdiction of all actions against the deceased, and that all suits must be cumulated and prosecuted there.

It was admitted that Ducker was dead, and that his succession was opened and a curator appointed in the parish of Concordia, and an inventory ordered to be taken of the property which might be found there.

The parish judge was of opinion, that the general jurisdiction which his court possessed had ceased; and that the case should be transferred to the Probate Court in Concordia.

The plaintiffs appealed.

J. & T. Slidell, for the plaintiffs.

auth. & pages

Green, the vendor, transferred the note, with his mortgage, to the defendants, and subrogated them to his rights by notarial act. EASTERN DIST.
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There is no evidence in the record, and no mention made in the act of sale, that Hurst, the payee of the note, endorsed it.

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The district judge, however, dissolved the injunction, and allowed the seizure and sale to proceed under the executory proceedings. The plaintiffs appealed.

I. W. Smith, for the appellants.

The defendants in the seizure have the right to resist the order of seizure and sale, unless the plaintiffs have strictly complied with all the formalities of the law. *Crane vs. Baillio, 7 Martin, N. S., 276.*

2. The order of seizure and sale is in the nature of a judgment; but it is rendered without citation, and on *ex parte* evidence only. That evidence, to be legal, must be wholly authentic. The plaintiffs, in the seizure, were bound to exhibit proof of three facts, *viz.*: 1st, That the debt sued on is now due to them; 2d, That it is due by the defendants in the seizure; and, 3d, That it bears mortgage on the property. *Tilghman vs. Dias, 12 Martin's Reports, 695.*

3. There is no evidence that the debt sued has ever been transferred to the plaintiffs in the seizure. Their petition sets out several endorsements all unproved, and derives title to the note through the last blank endorsement. By averring them specially, they become material facts, and cannot, on motion, be stricken out; they must be proved. Even the signature of the first endorser is not proved. The act of sale, which affords the only evidence on this point, does not show that Hurst ever endorsed the note sued on. *Wray vs. Henry, 10 Martin's Reports, 223; Lee vs. Dearmond, 4 Louisiana Reports, 320; Chitty on Bills, 627, and the authorities there cited.*

4. There is no evidence that the mortgage for the payment of the note has been legally transferred to the plaintiffs in the seizure. 1. Green could not transfer the mortgage,

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because, as the petition, the note, the protest, and the act of subrogation show, Green no longer owned the note when he subrogated the plaintiffs in the seizure to his rights: these rights had been previously extinguished by his parting with the note. 2. The subrogation must follow the petition and the note. The mortgage cannot be made to jump over intermediate endorsers to alight on the last. *Louisiana Code*, 2156, No. 1; 7 *Toullier, Droit Civil*, No. 116.

G. B. Duncan, for the defendants in injunction.

1. The defendants were entitled to the order of seizure and sale. *Code of Practice*, 63, 733. It is not necessary for an applicant for an order of seizure and sale to show that the defendant is bound to him by authentic act; if the defendant has bound himself in that manner to any one, and the applicant has succeeded to such rights, and shows it by authentic evidence, it is sufficient. *Crane vs. Baillio*, 7 *Martin, N. S.*, 274.

2. It is not correct to say, that the order of seizure and sale is a judgment; it is only an order to enable a party to carry a judgment already granted into effect. *Code of Practice*, 733; *Louisiana Code*, 3361.

3. The note for the payment of which the order of seizure and sale issued was given by the defendants, for the real estate mortgaged, purchased by them of Green, and the first endorser was but a security; the defendants in the order of sale, therefore, as they gave the note with Cornelius Hurst as endorser, did, by authentic evidence, themselves warrant the genuineness of Hurst's signature, and it is rather late for them afterwarde to say that his signature had not been shown. If there was any thing, however, in such an objection, it could not hold good in this case, for it is not true that there is no authentic evidence of his signature as endorser, for he is mentioned in the original act of mortgage as endorser of the note, and he himself signed the act before the notary, to verify the fact that he had endorsed the note. *Denton vs. Duplessis*, 12 *Louisiana Reports*, 89.

Eustis, J., delivered the opinion of the court.

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An order of seizure obtained by the defendants against a number of lots in the possession of the plaintiffs was enjoined at their instance. The injunction was dissolved, and the plaintiffs have appealed.

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The only question presented in this case is, whether there is any evidence, by authentic act, of the transfer of the note and mortgage on which the order of seizure was granted.

The first endorser on the note is Cornelius Hurst, in whose favor the note was drawn.

The act of sale, with which the note is identified by the signature and certificate of the notary, acknowledges the delivery of several notes as the price of the lots sold. The note in question is described as being to the order of Cornelius Hurst, but no mention is made in the act of sale of his having endorsed it. The endorsement is a matter *in pais*, of which the act itself contains no proof; no authentic evidence of the fact is before us. The transfer of the mortgage by the vendor and mortgagee to the holder of the note does not remove the difficulty. The act proves nothing more than it purports to contain, *viz.*, that the note was paid by the holder, and that the mortgage stipulated in favor of the mortgagee is transferred to the holder of the note. It does not prove that Hurst ever endorsed the note. It is true that Hurst was a party to the original act, in which he relinquishes his bid to Dakin & Dakin, but this fact repudiates the supposition that he endorsed the notes, before or at the time of passing the act, for no mention of his having endorsed them is made in the act. It may be conceded that he endorsed them, but the objection is that there is no record evidence of the fact. The defendant, under these facts, could not proceed by the executory process for the recovery of his debt.

Where certain notes are given in payment of the price of a piece of property, which in the act of sale are identified with the mortgage, and described as being to the order of C. H., but it is not stated that they were endorsed by C. H.: *Held*, that the mortgagee or his transferee, cannot proceed by the executory process against the property to enforce payment of the notes. The endorsement is a matter *en pais*, of which the act furnishes no proof.

The judgment of the District Court is, therefore, reversed, and the seizure and sale of the property described in the petition, under the order of the District Court, is enjoined. The defendants and appellants to pay costs in both courts.

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INSURANCE COMPANY.APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

When there is nothing in the policy which renders the insurers liable for the acts of the captain or officers of steam boats, their liability for their conduct must depend on the law.

Where the testimony of the officers of steam boats states that it is usual to take vessels in tow in their voyages up and down the river, it cannot have effect against the insurers, when there is no evidence as to the usage of insurance in such cases, or whether such a privilege is or not stipulated in the policies.

The business of towing ships and vessels is entirely separate and distinct from all things connected with or incidental to the navigation of the river by steam boats, or the transportation of freight and passengers.

So, where a steam boat is lost by the conduct of the captain, in attempting to proceed on his voyage with a brig in tow, lashed alongside, and it does not appear there is any clause in the policy allowing the privilege of taking a vessel in tow, or that the insurers acquiesced in this usage, the insured cannot recover of the underwriters.

This is an action on a policy of insurance, effected by the plaintiffs on the steam boat Fort Adams for six months, from the 25th day of November, 1836, at 6 per cent. premium, on one-third of the value of the boat, which was fixed at thirty thousand dollars. The plaintiffs allege the boat was lost by one of the perils insured against, to wit, that of the river Mississippi, and that the defendants are liable as for a total loss; the usual abandonment having been made by the owners, and the necessary notice and preliminary proof made to the underwriters.

The defendants denied their liability, and averred that the boat was lost in consequence of being overloaded; that her valuation was excessive, and the premium not paid; that the boat had been since sold, and the plaintiffs received the price, which they must refund if they recover. They further aver

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wherefore they pray judgment with costs.

Upon these pleadings and issues the cause was tried.

All the evidence which is material is embodied in the opinion of this court, and need not be recapitulated.

There was judgment for the plaintiffs, allowing them nearly all their claim, from which the defendants appealed.

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Chinn, for the plaintiffs, contended that the policy, upon its face, showed an insurable interest in the plaintiffs, which rendered their right to sue and recover undoubted. *Hughes on Insurance*, 352.

2. The testimony shows the boat was provided with a skilful and experienced commander, and a competent crew; that she was not overloaded, but had, on previous occasions, carried eleven hundred bales, being one hundred more than her last load. Her guards were above water, and did not touch it. The captain avoided the high wind as much as possible, and lay to all night. In the morning the wind had abated, and he pursued on his voyage until the wind rose, when he made for the shore, and saved all that was in his power.

3. The insured is bound in warranty for the capacity of his vessel, and to provide a skilful and honest commander, and to act in good faith; but it is not every fault or neglect of the captain or crew that exempts the underwriters. "The ship was burned through the neglect of the crew in lighting a fire in the cabin, and, going to rest without seeing it was properly extinguished, and the underwriters were held liable for the loss." *Hughes*, 196.

4. It is clearly deducible from the evidence, that the boat was lost by reason of the storm; by the winds and the waves which arose during the time embraced in the policy, which were the perils insured against.

5. There is also an objection, that there was no regular abandonment. This is proved to have been formally made, but the defendants, refusing to accept, told the plaintiffs to act in the matter, in taking care of the boat, as though they were still the owners, without insurance.

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6. It is next objected, that there was not a total loss. It is true there was not a physical, total destruction of the thing, but there was an entire loss of the value of the boat to the owners, by the stranding and sinking; this is sufficient to entitle them to recover as for a total loss. *Hughes, 291.*

Maybin, for the defendants, insisted that the steamer Fort Adams was not lost by one of the perils insured against, but by being overloaded, or in imprudently venturing out in a storm when she should have laid by. In this she incurred a risk, for which the underwriters are not responsible, as is evident from all the testimony, which shows, that she did not leak, that her timbers were sound, and no injury was done to, or break in them. She was either lost by overloading, or by running in the storm when a proper regard for the interest of all concerned required she should have laid by: in either case, the insurers are discharged. *Hughes, 139, 140, and 204; 1 Phillips, 179.*

2. There has been no abandonment made in this case, to entitle the plaintiffs to recover as for a total loss. The most they can recover is for the actual loss sustained. The stranding of the boat is not a total loss. *2 Phillips, 284-5-6; 3 Gill and Johnson, 450.*

3. There has not, in fact, been made, in this case, the necessary preliminary proof. None has been made except what appears on the face of the policy, when it is made for the benefit of all whom it may concern beside the plaintiffs. *1 Phillips, 497, 8.*

Eustis, J., delivered the opinion of the court.

This is an action on a policy of insurance on the steamboat Fort Adams. The insurance was for six months, from the date of the policy, and the loss was within that time. The case was tried by the court below, without the intervention of a jury. There was judgment for the plaintiffs, as for a total loss, and the defendants have appealed.

The adventures and perils insured against by this policy, "*are of the river and fire, and all that have or shall come to*

the hurt, detriment or damage of the said steam-boat, engine or any part thereof. The insurers are not liable for damages to the boat's machinery, unless occasioned by external causes or by fire."

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By a memorandum, "said boat is to have the liberty to navigate the Mississippi river and such tributaries as are suitable to her class."

The manner in which the loss occurred, is best explained in the words of the witnesses.

The protest made under oath by the master, mate, engineers and carpenter, on the 26th December, 1836, is as follows: "That said steam-boat being tight and strong, well manned, filled and provided, and partially laden with cotton, they departed with her from Coles' Creek, on the Mississippi, bound for New-Orleans, on the 6th December, 1836; on the same day reached Natchez, where they took in tow the brig *Auguste*, bound to New-Orleans, and again proceeded; on the 7th, they reached Fort Adams, where the steam-boat completed her loading, and the brig also took in some cotton. On the 8th, the steam-boat being in perfect order and in fair running trim, they started from Fort Adams to continue their intended voyage, with the brig lashed to their star-board side; towards the latter part of the day it came on to blow heavy, with considerable sea on the river. At seven, P. M., stopped at the wood-yard opposite to Tunica Island, to replenish fuel; during this time the wind and swell increasing and the night setting in dark, with every appearance of a storm, the master determined to lay by until morning. On the 9th, at four, A. M., the weather moderating, they got under way, but at daylight it again came on to blow heavy; wind up stream, gradually increased to a gale, causing a labor, some chopping sea against the current, which made both the steam-boat and brig pitch and strain excessively. At half past eight, A. M., found the boat was leaking, and on examination being immediately made, they discovered that the hold was rapidly filling. On this emergency, the master caused her to be steered for the shore; directing at the same time the crew of the brig to prepare to cast off; this was not

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however done until they came very near, when the brig unlashd and came to anchor ; and the boat shooting ahead, took the ground on Port Hudson bar, a little above Thompson's Creek, with her head on shore and touching abaft; lines were immediately carried out, and the boat so secured as to prevent her from sliding off the bank. A stage was next rigged forward, to prevent further damage, if not total loss."

This, by the agreement of counsel, is to be considered as evidence, except so far as relates to the testimony of the master and John Bennet, the pilot. In the examination of the captain as a witness, he states "that he commanded the steam-boat Fort Adams in December last, at the time of her loss on the Mississippi river, and caused a protest to be made thereof before a notary public, which is on file, and has been read by him, and the facts stated therein are true. On being further interrogated, he says, that upon the trip in which the said boat was lost, she was laden with cotton, having on board about one thousand bales. He considered the said boat fully competent to the transportation of her then cargo in the waters of the Mississippi river, for she had before that time frequently transported more than eleven hundred bales. He has been conversant with the business of steam-boating on the Mississippi for four or five years. He has always considered it a part of the business of steam boats to take brigs and other vessels in tow, in descending and ascending the Mississippi river. He has known a great many boats to do so."

Cross-examined : He says, "that when he speaks of the facts stated in the protest being true, he means so far as his knowledge of them extends, as he was absent from the boat some days after the loss ; that he supposes she is about ten or twelve months old, her tonnage about two hundred tons, and when she had eleven hundred bales of cotton on board, she was then plying between Natchez and New-Orleans ; and had carried as much cotton two or three times before, with some sugar. He cannot say that the gale blew hard all night when he stopped to wood, but that about four o'clock in the morning, of the 9th December, the wind had ceased

to blow hard, when he started ; and that about five o'clock it began to blow fresh, and continued so until the accident happened, but not steadily. Sometimes it would blow fresh and cease a little ; that the brig was lashed by the steam-boat all this time. He cannot say where the leak was, and on discovering that the boat was leaking, he went down to the fire room, where he found the water was coming on her guards, but did not discover any water in her hatches, until they were going into shore, when she took the ground a short time after they first discovered she was leaking."

"At the time of the accident, he thinks the brig was to the windward of the Fort Adams ; that he does not think the brig caused the boat to careen ; they kept an even keel. The towing the brig, he thinks, did not affect the steam-boat in any other manner than to impede her progress. The cotton was dry when shipped. The heavy swell caused the water to break on the guards, the under sides of which might have touched the water, but were not under water. He has been in heavier swells, on the river Mississippi, than the one in question, but never experienced an accident like this. The first boat he commanded was in 1833."

Bennet, the pilot, deposed, that "at the time of the loss of the Fort Adams, she was laden with one thousand bales of cotton ; that on former trips she had carried eleven hundred bales in safety. He has been accustomed to steam-boating six or seven years, and has always considered it in accordance with the customs of trade, for steam boats to take in tow, brigs and other vessels on the waters of the Mississippi. He believes the loss of the Fort Adams arose from the tempestuous weather which she encountered. He was, however, the second pilot, and as far as he knows, the protest which he signed is correct."

Cross-examined : Says "the boat was not so deeply laden when she sunk, as on former trips. During the night of the 8th December, the gale was not heavy when the boat laid to in an island chute, where the wind had no effect on her. The gale commenced the next morning between seven and eight o'clock. They started about four o'clock, and it was

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only a short time before the leak was discovered, that the swell was so great. The wind then very high and up the river. It was not more than eighteen or twenty minutes, before the boat was discovered leaking, that the wind blew very fresh; the brig was lashed to the steam-boat during the whole time, and all the previous night. He was at the wheel, when they started in the morning, and when they rounded to the shore. No injury happened to the brig, and he does not think that towing the brig caused the steam-boat to careen. It is a general thing for vessels to be towed up and down the river by steam boats. That the wind was ahead all the time they had the brig in tow, and when they discovered the Fort Adams was sinking; but the towing the brig did not interfere with the steering of the steam-boat. She was not quite a year old, and built at Cincinnati."

The Fort Adams was afterwards abandoned to the underwriters, and we shall assume, for the purposes of this inquiry, that *the loss was constructively total.*

Captain Spedden, an inspector of three of the insurance offices of this city, says, that "he knows the steam-boat Fort Adams; examined her previous to the accident, but saw nothing defective about her; she was a new boat. Witness was inspector of defendants' office, and it was his duty to examine her carefully, and she was sound, and numbered as the first class of boats. Witness, with captain Robertson and Stockton, met on board of her, when she was brought to the city after the accident, to examine her, and found nothing the matter with her. Every thing appeared to be in its place. This was a short time after she was brought down. They gave her a thorough examination and discovered nothing about her, only that some of her seams had opened in consequence of her having been sunk. There was no strain or breach about her, which could have caused her sinking. She was brought down here some time last summer. He saw no repairs that had been done to her."

James Stockton, witness for defendants, says, "he had an opportunity of examining the Fort Adams, with captains Spedden and Robertson, and is himself inspector of

three insurance offices in New-Orleans. He examined before and since the accident. She was a first class boat, nearly new, and tight and strong. He examined her on her return, with those gentlemen, sometime between July and September, 1837, and confirms captain Spedden's testimony. The Fort Adams was again sunk on the opposite side of the river, from New-Orleans, in the gale about the 1st of October, 1837."

Captain Robertson confirms this statement. Captain Gillet, who purchased the Fort Adams at the sale made at public auction after the abandonment, corroborates the testimony of these witnesses, and we think that their account of the condition of the boat, is conclusive.

I. The question submitted to us, is whether under these facts the insured can recover?

It must be observed, that there is nothing in the policy which renders the insurers liable for the acts of the captain or officers of the steam-boat: their liability on this subject depends entirely on the law.

When the steam-boat was at Natchez, the captain took in tow a brig, and when the loss occurred, the brig was lashed alongside of the steam-boat. The witnesses, all of whom are or have been engaged in the navigation of steam boats on the river, state that it is usual for steam boats to take vessels in tow in their voyages up and down the river; but we have no evidence as to the usage of insurance in that case, and we are not informed whether such a privilege is or not stipulated in the policies. The business of towing ships is entirely separate and distinct from all things connected with or incidental to the navigation of the river by steam boats, or the transportation of freight and passengers. An usage which would throw this additional risk on insurers, at least ought to have been proved to have been acquiesced in by those most affected by it. *Louisiana Code, article 3.* If the owners of steam boats wish to have the privilege of towing vessels, let a clause to that effect be inserted in the policies of insurance. The towing a heavily laden ship by a steam-boat, with her tiers of cotton on deck, necessarily

When there is nothing in the policy which renders the insurers liable for the acts of the captain or officers of steam boats, their liability for their conduct must depend on the law.

Where the testimony of the officers of steam boats state that it is usual for them to take vessels in tow in their voyages up and down the river, it cannot have effect against the insurers, when there is no evidence as to the usage of insurance in such cases, or whether such a privilege is or not stipulated in the policies.

The business of towing ships and vessels is entirely separate and distinct from all things connected with or incidental to the navigation of the river by steam boats, or the transportation of freight and passengers.

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So, where a steamboat is lost by the conduct of the captain in attempting to proceed on his voyage with a brig in tow lashed alongside and it does not appear there is any clause in the policy allowing the privilege of taking a vessel in tow, or that the insurers acquiesced in this usage, the insured cannot recover of the underwriters.

impedes her progress, and it is idle to say does not increase the risk of the boat. "The meaning of the contract of insurance for the voyage is, that the voyage shall be performed with all safe, convenient and practicable expedition, and in the regular and customary track. The shortness of the time, or of the distance of a deviation, makes no difference as to its effect on the contract." 3 *Kent's Commentaries*, 312.

In principle, this rule relates to an insurance on time. The insured cannot subject the insurer to risks not assumed by his contract. We must have other evidence as to *such an usage* before we can permit it to change the terms of a written contract, and to subvert what we consider an elementary principle of the law of insurance.

II. The loss in this case was caused by the conduct of the captain, in attempting to proceed on his voyage with the brig lashed alongside of the steam-boat. The condition of the weather was such as to have put any prudent man on his guard against attempting to navigate a steam-boat loaded with cotton, with this additional incumbrance. What could have been easier than to have cast off the brig, thus saving the property and lives entrusted to his charge, from this unnecessary danger, for it is in vain to contend that the additional weight of the vessel did not contribute to, if not directly produce the disaster. Had the boat been perfectly free, there is no evidence which satisfies us that she might not have proceeded on her voyage in safety. No injury was done to the brig, and none to the steam-boat by the force of the winds and waves, other than that which was caused by their being connected together in one unweildy mass. This conclusion is forced upon us by the facts of the case.

Who is answerable for this conduct of the captain? This depends on principles which are elementary of the law of insurance. We have seen that by the policy, the insurers do not take upon themselves any responsibility for the acts of the captain. The master is for the purposes of navigation, the agent of the owner of the ship, and the owners and not the insurers, in this case, are to bear the consequences of his neglect, unless the latter by their contract have taken

upon themselves to answer for him. *Valin, book 3, title 6, Eastern Dist. article 23. Emerigon, Contract of Insurance, chapter 4, section 4, section 2 and 3.* May, 1839.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and judgment entered for the defendants, with costs in both courts.

LOUISIANA STATE BANK VS. SENECAI.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Directors are not officers of a bank in the proper sense of the word; nor have they, *individually*, any power or control in its management. They act collectively, and at stated times: they are not the mandatories or agents of the bank.

So, where a note was discounted at the instance of one of the directors, who knew, but failed to disclose, a condition on which it was given, to wit, that it should not be negotiated, nor payment exacted, until certain mortgages were released: *Held*, that the bank is not to be considered as cognizant of the condition, and is entitled to recover.

This is an action by the bank against the endorser of a promissory note. The case was remanded from this court at April Term, 1837, to allow the defendant to offer evidence that he endorsed the note for the accommodation of the drawer, and that it was stipulated by the vendor, in an act of sale, that the note should not be negotiated, nor payment exacted until certain mortgages, existing on the property for which it was given in part payment of the price, should be raised. See 11 *Louisiana Reports*, 29.

On the return of the case to the Parish Court, it was submitted to a jury.

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The evidence shows that the note in question was given by A. L. Boimaire, for part of the price of certain property sold by Madame Peychaud and her husband, and the defendant endorsed it. Peychaud was a director in the Louisiana State Bank, and offered the note for discount. The act of sale contained a condition that the note should not be negotiated, nor payment exacted, until a certain mortgage existing on the property should be raised. Peychaud withheld this fact from the knowledge of the board when the note was discounted.

Boimaire, to whom the property had been sold, failed, and made a surrender of this same property, which was sold by the syndic, who offered to pay over the proceeds of the sale, as they were received, to the bank, on account of this note, which was refused.

The judge presiding refused to charge the jury that Peychaud, even when offering the note for discount, being a director, must be considered as the agent or mandatory of the bank. The refusal to charge, and the charge to the jury, were excepted to by defendant's counsel.

There was a verdict and judgment for the plaintiffs, and the defendant appealed.

Grima, for the plaintiff, insisted that the judgment was correct, and should be affirmed.

Hennen, for the appellant, contended, that the fact of Peychaud being a director, and procuring the note to be discounted, was full notice to the bank of the condition in the note that payment was not to be demanded until the general mortgage was released, which was made an express condition.

2. Peychaud was a director, and consequently the agent or mandatory of the bank; and notice to him was notice to the bank. The principal is presumed to know whatever is known to the agent in matters concerning the agency; and if one of two innocent persons suffer from the fraud and negligence of a third, the question is, which of the two gave credit. See *Hammond's Treatise on Principal and Agent*, 278.

Rost, J., delivered the opinion of the court.

This case has been twice before this court, and the facts of it are fully stated in the printed report of the last decision, 11 *Louisiana Reports*, 29. It was remanded to enable the defendant to prove that the note upon which he is sued had been discounted by the plaintiffs, with the knowledge of certain stipulations in a notarial act, under which said note was not to be negotiated until certain general mortgages, existing upon the property for which it had been given, were raised. The Parish Court gave judgment against him, and he appealed.

It was proved on the trial, that the note was given in payment of land sold by Mrs. Peychaud, and was delivered to her husband, Anatole Peychaud, who had signed with her the deed of sale. That deed contains a clause that the note upon which this action is brought shall not be negotiated, nor the payment thereof exacted, until the property sold shall be fully released from all liabilities resulting, or to result, from certain general mortgages then existing upon it. Peychaud, being at that time a director of the Louisiana State Bank, offered the note for discount, before the mortgages were raised; was present at the board when it was acted upon; took no part in the discount of it, and gave no information to the board in relation to the restrictions contained in the act of sale. The note was discounted for his benefit, and the defendant now contends that he was the agent of the bank, and that the knowledge of the agent being the knowledge of the principal, the plaintiffs are to be considered as having received notice, and ought not to recover. If the knowledge of those facts had been brought home to the president or cashier, we would unhesitatingly say that the plaintiffs were bound by it, they being the executive officers of the bank, upon whom all notices and process may be served. But directors are not officers of the bank, in the proper sense of the word, nor have they individually any power or control in the management of its concerns: they act collectively, and at stated times, and have otherwise no more to do with the general management of

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Directors are not officers of a bank in the proper sense of the word, nor have they, individually, any power or control in its management. They act collectively and at stated times. They are not the mandatories or agents of the bank.

So, where a note was discounted at the instance of one of the directors who knew, but failed to disclose a condition on which it was given, to wit, that it should not be negotiated nor payment exacted, until certain

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mortgages were
released: *Held*,
that the bank is
not to be consid-
ered as cogni-
zant of the con-
dition, and is
entitled to reco-
ver.

the institution than the other stockholders. The director, in this instance, had a direct interest in suppressing the information he possessed; and it would be extending constructive notices beyond all reasonable bounds to say that the plaintiffs must be held cognizant of facts which are proved to have been intentionally concealed from them, by a person who, individually, was neither their officer nor their agent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

ROBERT AND WILLIAMS vs. COMMERCIAL BANK.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The authority of an attorney at law extends to all the means necessary to the protection and promotion of the interests of his client, so far as they are *affected by the proceedings in court*; but he cannot enter into an agreement with the members of the bar *not to try causes* for a certain time, which would be binding on his client, and preclude him from having his cause set for trial, by employing other counsel.

An agreement among counsel, that they will *not try causes* during the summer and early fall months, is not *legally binding* on the parties to it. If a cause is afterwards set for trial by the original counsel, at the instance of the client, the court will disregard his general promise, and allow him to proceed.

Damages allowed on the return of protested bills include all charges, such as premium, cost of protest and postage. The holder can claim *interest* on those damages, but is not entitled to the *difference of exchange*.

This is an action instituted on the following check or bill of exchange:

"Commercial Bank of New-Orleans, May 6, 1837.

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"Pay to the order of C. A. Jacobs, on the 24th May, 1837,
(without grace) five thousand six hundred and twenty-five
dollars." (Original acceptance waived.)

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"EDWARD DUPLESSIS, Cashier.

*"To D. Thompson, Esq.,
Cashier Bank of America, New-York."*

Endorsed :

"Pay to Messrs. Carroll, Hawkins & Logan, or order.

"C. A. JACOBS."

"Pay to Howell L. Williams, or order.

"CARROLL, HAWKINS & LOGAN."

Demand of payment was made on the 24th May, 1837, by a notary, who states in his protest, that he presented the original bill, at the Bank of America, in New-York, to the paying teller, and demanded payment, who answered that "they could not pay it, for want of funds for that purpose;" and it was accordingly protested for non-payment. On the 9th June following, it was presented by a notary to the Commercial Bank of New-Orleans, who demanded payment thereof in specie, as well for the amount, as for premium paid, say eighty-four dollars and thirty-seven cents; protest, one dollar and fifty cents; postage, seventy-five cents; interest due, at 7 per cent. (New-York rate) per annum, say seventeen dollars and fifty cents; and damages, at ten per cent., five hundred and sixty-two dollars and fifty cents, making in all the sum of six thousand two hundred and ninety-one dollars and sixty-two cents, which amount the cashier declared he was willing to pay in the current bank notes of the city, but would not pay it in specie, as the bank, in common with the others, had suspended specie payments.

Suit was instituted, and the defendants pleaded a general denial.

In the month of June, 1838, most of the members of the bar, practising in the District Court, signed an agreement, binding themselves not to have any causes in which they were concerned set down for trial after the first of July.

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One of the plaintiffs being in the city, disavowed this agreement made by his lawyer, so far as regards this cause, and employed other counsel.

The cause was set for trial on the 9th July, and the counsel for the defendant notified thereof. On the day of trial he had left the city, and his brother, also a member of the bar, moved for a continuance, which was overruled, and the cause proceeded to final judgment, in favor of the plaintiffs, for the amount of their demand. The defendants appealed.

Canon, for the plaintiffs, urged the affirmance of the judgment.

C. M. and *F. B. Conrad*, for the appellants.

1. The court below erred in refusing the continuance prayed for by defendants, and their bill of exceptions on that point must be sustained, and the cause remanded to be proceeded in according to law. The plaintiff was bound by the written agreement of his counsel, on file, to continue the cause, and if he has sustained any damage thereby, he has no action against his attorney. The law necessarily vests counsel with a large discretion over a suit, and the authorities on this subject extend that discretion even much further than it is contended for in this case. *Paxton vs. Cobb*, 2 *Louisiana Reports*, 140. 6 *Cowan's Reports*, 386. 1 *Wendell's Reports*, 108. 16 *Johnson's Reports*, 53.

2. On the merits, the court below was clearly wrong: 1st, in granting judgment for the amount of the premium on the bill, the damages being given by law in lieu of the return premium (1 *Moreau's Digest*, 93; *Bailey on Bills*, 375); 2d, in granting interest, at 7 per cent., from the 24th May to 9th June, 1837, on the aggregate amount of the bill, damages, costs of protest and postage; 3d, in allowing interest from the 9th June, till paid, at 10 per cent. on the like amount of the bill, damages and expenses, as well as on the interest which had accrued between the 24th May to 9th June, thus making defendants pay compound interest.

Rost, J., delivered the opinion of the court.

The plaintiffs claim from the defendants the amount of a check, or bill of exchange, drawn by the said defendants upon the Bank of America, in New-York, and returned unpaid ; they also claim ten per cent. damages and interest, according to the laws of New-York, the premium paid for the bill, the cost of protest in New-York, and postage.

The petition contained the usual averments of demand, protest and notice, and further alleges, that the returned bill was duly presented to the defendants and payment demanded in specie, and upon the refusal to pay, that it was protested, whereby the defendants became liable, under their charter, to pay interest at the rate of ten per cent. per annum, which the plaintiffs also claim, together with the costs of the second protest.

The defendants, by their counsel, came into court, admitted in their answer that they had drawn the bill, and denied all the other allegations of the petition.

After issue joined, a large number of members of the New-Orleans bar, among whom were the counsel for both plaintiffs and defendants, entered into the following agreement :

"We, the undersigned, members of the bar, agree that we will not fix any case for trial from and after this date, until the first Saturday in November next, nor will we take any step in any case not usually taken in vacation, unless by consent of all parties interested therein. This agreement to bind the undersigned towards each other, but not to any members of the bar who may refuse to sign it."

During the existence of this agreement, one of the plaintiffs went into court in person, had the case set for trial, discharged his counsel, and intrusted the management of the suit to another, who had not become a party to the agreement.

When the case was called for trial, the defendant's counsel moved for a continuance, alleging the aforesaid agreement, and stating on oath, that on the faith of it they had not prayed for a jury, which, under the regulations of the court, would have had the effect of continuing the case

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EASTERN DIST. until the month of November following; and also, that their regular counsel had left the state for the summer months.
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The court overruled the motion, and the defendants excepted. Judgment was given in favor of the plaintiffs, agreeably to the prayer of their petition, and the defendants appealed.

The authority of an attorney at law extends to all the means necessary to the protection and promotion of the interests of his client, so far as they are affected by the proceedings in court; but he cannot enter into an agreement with the members of the bar not to try causes for a certain time, which would be binding on his client, and preclude him from having his cause set for trial, by employing other counsel.

An agreement among counsel, that they will not try causes during the summer and early fall months, is not legally binding on the parties to it. If a cause is afterwards set for trial by the original counsel at the instance of the client, the court will disregard his general promise, and allow him to proceed.

We are satisfied that the court did not err in ruling the defendants to trial. Admitting, as decided by this court in the case of *Paxton vs. Cobb*, 2 *Louisiana Reports*, 140, that the authority of the attorney extends to every thing necessary to the protection and promotion of the interests intrusted to his care, so far as they are to be affected by the proceedings in the court where he represents his client, it cannot be seriously contended that the agreement entered into in this instance was necessary to the protection and promotion of the plaintiff's interest, or that it had any other object than the personal convenience of gentlemen of the bar. It was made with a view not to try cases during the summer months, as had been the custom heretofore, by the joint consent of the bench and the bar. Such an agreement was not legally binding upon the parties to it; and if the original counsel of the plaintiffs had set the cause for trial himself, the court would have disregarded his general promise not to do so, and would have permitted him to proceed. All that the court could have done would have been to protect the defendants from surprise, in consequence of the breach of the agreement. What the original counsel of the plaintiffs could have done, his clients had the right to do. They could take the management of the suit from him at any time, and conduct it in their own way. The motion for a continuance was not made on the ground of surprise. If the regular counsel of the defendants was absent, they had other counsel in court, who appear to have done full justice to their cause; and the allegation that, if it had not been for the agreement, they would have prayed for a jury, and thereby prevented the plaintiffs from recovering what is justly due them until the ensuing fall, cannot be listened to.

The plaintiffs have made out their case satisfactorily, but

we think the court erred in allowing the premium paid for the bill, the costs of protest in New-York, and the postage. Although contrary decisions may be found on this subject in the courts of the Atlantic states, the better opinion seems to be there, that the damages allowed on the return of protested bills are inclusive of all charges, and that the plaintiff is entitled to interest on those damages, but can claim nothing for the difference of exchange. However this may be, the rights of the plaintiffs do not rest with us upon immemorial custom; they are defined and fixed by a statute which provides that the drawer of an inland bill, returned unpaid, shall pay and discharge the contents of the bill, together with ten per cent. for the damage thereof. It is evident that the premium paid, the costs of protest, and all other charges, form a part of the damages fixed by law. The statute will bear no other construction; and the rule which it establishes appears to us simple and certain in its application, and well adapted to the interests of commerce.

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Damages allowed on the return of protested bills include all charges, such as premium, cost of protest and postage. The holder can claim interest on those damages, but is not entitled to the difference of exchange.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and, proceeding to give such a judgment as should have been given in the first instance:

It is further ordered, adjudged and decreed, that the plaintiffs recover from the defendants the sum of six thousand two hundred and five dollars, with interest at the rate of ten per cent. per annum, from the 9th of June, 1837, until paid, on six thousand one hundred and eighty-seven dollars thereof, and the costs of the District Court; those of the appeal to be paid by the plaintiffs and appellees.

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CHALON
vs.
PEPIN.

CHALON vs. PEPIN.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS, JUDGE DUNCAN
PRESIDING.

Where certain lots are sold at public auction in reference to a certain plan, representing a passage through the square on which some of the lots are *made to front*, and it turns out that there was no public passage authorized by the corporation, this is an artifice or error, which will avoid and annul the sale at the instance of the purchaser.

This is an action on two promissory notes executed by the defendant, as the purchaser of certain lots, in part payment of the price.

The defendant admitted his signature, but averred that said lots were sold in reference to a plan, as fronting on a passage which the plaintiff had no right to make. He prays that the sale be rescinded, and notes cancelled and given up, and that the sum of six hundred and ninety-three dollars and interest thereon, which he has paid, be refunded, and for which he prays judgment in reconvention.

The plan by which the lots were sold, and, also, the act of sale, were produced in evidence. The plan is referred to, and made a part of the sale, and has the passage marked and represented on it. But there is no authority shown from the corporation to make this a public passage or alley. The city judge, however, gave judgment for the plaintiff, and the defendant appealed.

Bodin, for the plaintiff.

Pepin, in *propria persona*.

Rost, J., delivered the opinion of the court.

The defendant resists the payment of two promissory notes subscribed by him, because those notes were given in consideration of two lots, which were sold as fronting a certain passage, which the plaintiff represented as public, although he had no authority from the corporation to open it. He

further alleges that he has paid on account of said lots, the sum of six hundred and ninety-three dollars, which he claims in reconvention. His answer contains a prayer for general relief. The plan, as well as the description in the sale, represent the lots as fronting on Ursuline-street. There is upon the plan, a strip of land running through the square, between parallel lines, and marked as a passage. One of the lots has a front on that passage, which makes it a corner lot, and the other is on the opposite side of the street. The lots are described in the sale by their front on Ursuline-street and their depth : nothing is said or warranted about a public passage, but the plan is made a part of the act, and the fact which it discloses, that six other lots were laid out by the plaintiff fronting upon that passage, and without issue upon any other street, satisfies us that the passage was represented as a public one, at the auction sale.

The plaintiff has not shown that the passage had been opened by the authorization of the city corporation. We must presume that the authorization does not exist, and without it the plaintiff has been guilty of an artifice, or at least has committed an error, which must avoid the sale. The inconvenience and damage occasioned by it to the defendant, are manifest.

It is, therefore, ordered, adjudged and decreed, that the judgment of the city court be avoided and reversed ; that the sale made by the plaintiff to the defendant, on the 27th August, 1836, be avoided and annulled ; and that the defendant recover in reconvention from the plaintiff, six hundred and ninety-three dollars, with costs in both courts.

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CHALON
vs.
PEPIN.

Where certain lots are sold at public auction in reference to a certain plan, representing a passage through the square on which some of the lots are made to front, and it turns out that there was no public passage authorized by the corporation, this is an artifice or error, which will avoid and annul the sale at the instance of the purchaser.

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JOHNSTON'S
HEIRS
vs.
COX'S SYNDIC.

JOHNSTON'S HEIRS vs. COX'S SYNDIC.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

131	536
45	451
13	536
113	868

In an action by the heirs of the testator, the homologation of the executor's account is no bar to the introduction of evidence to show that the executor had received funds for which he had not accounted, or failed to put in any previous account, when it is offered before he has been discharged.

A certificate of the collector of the customs, made up from the import books of his office, stating that certain custom-house bonds were paid, is not admissible in evidence, when the provisions of the 2249th article of the code are not complied with, by first proving the loss of the originals, &c.

In case of uncertainty as to the amount due, the executor cannot complain, as it was his duty to have prevented this by rendering a correct account of his administration.

This is an action instituted by the testamentary heirs of the late James Johnston, who died in the city of New-Orleans the 3d July, 1818, against the late N. Cox, then surviving executor. The suit was commenced in December, 1834, to compel the executor to render an account, and pay and deliver over all the moneys and property of every description belonging to the estate of the deceased. During the pendency of this suit, Mr. Cox died, and it has been carried on against his syndic.

An account was rendered, which was opposed, and this formed the issue on which the principal contestation arose in the Court of Probates.

Several bills of exception were taken on the trial to decisions of the judge of probates, which are specially noticed in the opinion of this court, which follows.

The probate judge made up an account from the documents, evidence and vouchers exhibited in the case, and corrected and amended the executor's account, and gave judgment for a balance of upwards of fourteen thousand dollars due the plaintiffs. The syndic of Cox appealed.

J. Skidell and *Strawbridge*, for the appellant, made various objections to the account made up by the probate judge, and to his judgment, and argued the several bills of exception taken by them to the decision of the court, rejecting evidence of payments, and allowing new evidence against an account which had been homologated.

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May, 1839.

JOHNSTON'S

HEIRS

vs.

COX'S SYNDIC.

Nixon, contra.

Eustis, J., delivered the opinion of the court.

This action was instituted against Nathaniel Cox, the executor of the late James Johnston, by the plaintiffs, the heirs of the deceased. During the pendency of the suit Cox died, and the syndic of his succession was made a party defendant. The judge of the Court of Probates rendered a judgment in favor of the plaintiffs for the sum of fourteen thousand two hundred and twenty-eight dollars and thirty-three cents against the succession, and the syndic has appealed.

A bill of exceptions was taken by the counsel for the defendant to an opinion of the court below, admitting certain evidence adduced by the plaintiffs, on the ground that a former account filed by the executor having been homologated, and the opposition thereto discontinued, no new examination of the accounts could be made, or the defendant held to any further account. But the reason of the judge in admitting the evidence is conclusive. The evidence went to establish that the executor had received funds which he had not accounted for, and the homologation of an account in a case like this, in which the executor was not discharged, is no bar to any inquiry and demand for an account of funds which may have come to the executor's hands, and which are not put in any previous account.

In an action by the heirs of the testator, the homologation of the executor's account is no bar to the introduction of evidence to show that the executor had received funds for which he had not accounted, or failed to put in any previous account, when it is offered before he has been discharged.

There is also a bill of exceptions to the opinion of the judge, in refusing to admit what appears to be a list of custom-house bonds due by the late James Johnston, and which were paid after his decease. The certificate of the collector states that the list was taken from the records of

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HEIRS
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COX'S SYNDIC.**

A certificate of the customs made up from the import books of his office, stating that certain custom - house bonds were paid, is not admissible in evidence, when the provisions of article 2249 of the code are not complied with, first proving the loss of the originals, &c.

the custom-house, and that the same have been paid to the government. Mr. Breedlove states, under oath, that the list was taken from the import book of the custom-house. The judge decided that this certificate could not be admitted in evidence, unless the provisions of the article 2249 of our code were first complied with by the party offering it. That article provides, "that when an original title, by authentic act or by private signature duly acknowledged, has been recorded in any public office, by an officer duly authorized, either by the laws of this state or of the United States, to make such record, the copy of such record, duly authenticated, shall be received in evidence on proving the loss of the original, or showing circumstances, supported by the oath of the party, to render such loss probable." As no attempt or offer was made to show what this article requires, as an indispensable pre-requisite for the admission of evidence of this kind, we think the judge decided correctly in refusing to admit in evidence the document offered.

The deceased died in New-Orleans in the year 1818. Thomas L. Harman, John Davidson, Denis de la Ronde, and Nathaniel Cox were appointed by his will executors. The three latter only acted, and their agency appears not to have been regular or continued; indeed, so much confusion appears to have attended all their doings, that no satisfactory account or explanation has been, or we presume can be given of them. Cox was the surviving executor, as we consider him. It appears that in August, 1818, he tendered his resignation as executor, to the Court of Probates, but he appears to have afterwards had almost the sole management of the estate. He alone signed the inventory of the deceased.

The plaintiffs, the children of the deceased, were minors in a foreign land at the death of their father. That he left a handsome property is proved by indisputable evidence. This is not accounted for. We have nothing before us by which we can do certain justice, perhaps, even to the succession of the deceased defendant. But it was his duty to have prevented this uncertainty, by rendering a correct

account of his administration. It was in his power alone to have rendered clear that for which we in vain seek an explanation. There is no view of this case in which we should not be disposed to award to the plaintiffs as large a sum as that allowed by the judgment of the court below; and as the plaintiffs, by their counsel, have signified to us that they are satisfied that the judgment should remain as it is, we confirm it.

The judgment is, therefore, affirmed, with costs in both courts.

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BERTHOUD
vs.
ATLANTIC MARINE AND FIRE INSURANCE CO.
In case of uncertainty as to the amount due, the executor cannot complain, as it was his duty to have prevented this, by rendering a correct account of his administration.

BERTHOUD vs. ATLANTIC MARINE AND FIRE INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE BUCHANAN PRESIDING.

Where the agent of the insured made his written application, and the rate of premium was marked on it by the secretary of the office, but not signed by him, and he expressly informed the agent that the policy would not be delivered until the premium was paid, and in the mean time the vessel insured was destroyed by fire, five days after the application: *Held*, that the contract of insurance was not complete, the premium not being paid nor the policy delivered, and that the underwriters were discharged.

No contract is complete without the assent of the parties. In reciprocal contracts it must be expressed. In this case the assent of the defendants was wanting. The proposition to insure was accepted with a condition which was never complied with.

This is an action on a contract of insurance alleged to have been made between the plaintiff's agent, L. H. Gale, to whom his ship, the *Moro Castle*, was consigned, and the defendants.

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The whole case turns on the question, whether the contract of insurance was complete between the parties at the time of the happening of the loss.

The evidence shows, that the application was made by Mr. Simmons, a clerk of Gale, on the 7th February, 1837, for insurance on the plaintiff's ship, the *Moro Castle*, and the rate of premium marked at the foot of the memorandum in the handwriting of the secretary of the company, which was accepted by the agent, Gale, in whose name the policy was made out. The policy was filled up by the clerk of the office, and the names of the president and secretary affixed thereto, but the agent was distinctly informed by the secretary that the policy would not be delivered until the premium was paid. On the 12th of February, five days afterwards, and before the policy was called for or the premium paid, the vessel was destroyed by fire at the Levee, in New-Orleans. The plaintiff now demands the amount proposed to be insured on her, and had judgment, from which the defendants appealed.

Strawbridge, for the plaintiff.

Grymes, for the appellants.

Eustis, J., delivered the opinion of the court.

The plaintiff sues on a contract of insurance, which he alleges was made on the 7th of February, 1837, with the defendants, by his agent, on the ship *Moro Castle*, then laying in New-Orleans, for the sum of six thousand dollars, being one-half her value.

The following document is relied on by the plaintiff, as evidence of his contract :

" Insurance on the body, tackle and apparel of the ship *Moro Castle*, Captain Smith, valued at twelve thousand dollars, for the time of five months, with general liberty, except the ports west of the S.W. Pass : Vera Cruz admitted. Loss, if any, payable to Levi H. Gale.

" *Per pro* : WM. H. SIMMONS.

"Six thousand dollars of the above insured by Mississippi Fire and Marine Company. EASTERN DIST.
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"\$6,000."

"A 2. Four per cent."

Across the lines is written, "Accepted, Wm. H. SIMMONS."

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In pursuance of this proposal and acceptance, it is alleged a policy was made out and signed, but which the defendants refused to deliver to the plaintiff.

The Moro Castle was lost by fire on the morning of the 12th of February, 1837.

The mark "A 2. Four per cent." was made by Mr. White, the secretary of the company. He was examined as a witness, and states, "that, as soon as the application was marked with the premium, and accepted by Mr. Gale, as appears on the face thereof, I immediately told Mr. Simmons to go and bring me the amount of the premium immediately, intimating, by my language and manner, that unless that was done the risk would not be taken by the office; and this, I have no doubt, he well understood, as he turned round and looked me full in the face, and departed, as I supposed, for the purpose of complying with my demand. The application was then laid on the table, and the clerk employed in the office, as is the constant practice, took it and filled up the policy agreeably thereto. This was done that it might be ready for delivery whenever the premium should be paid."

Simmons, the person who made the application, was examined as a witness for the plaintiff. He states, in the course of his examination, that a day or two after the vessel was burnt he applied for the policy; the answer made was, that the policy was not filled out, because he had not paid the premium.

White also says, in his examination, that he was determined not to deliver the policy or execute the contract until the premium was paid; and he was determined not to do so because Levi H. Gale, in whose name and for whose use the insurance was demanded, was at that time in very bad credit, and the deponent had the best evidence of his inability or unwillingness to pay; that he had been, some

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time before, a customer of the office ; that he was then, and had been some time before, indebted to the office for premiums on former risks, payment of which could not be obtained, though often demanded ; and, but a short time before, a seizure was made by a creditor of Gale, of a claim he had against said company, and the amount thereof seized in the hands of said company. The process, or notice of seizure of said claim, was in the hands of the deponent at the time the application was made.

Gale was examined as a witness for the plaintiff. By orders from the captain of the Moro Castle, he had insurance effected on the ship. He had done business for a long time with this office. The mode of doing business was, when the insurance was made, for the deponent not to take the policy at once, but it was left in the office until many had accumulated ; they then generally requested him to withdraw his policies, and he then settled by giving them a note. They never did demand of deponent payment of a premium before delivering a policy. In the interval between effecting this insurance and the loss, deponent thinks he was in the office, and that they asked him to send and get his policies.

This witness does not pretend to contradict the declarations of Mr. White, although the indirect effect of his testimony has a tendency to weaken their effect.

He does not pretend to question the statement of White as to the condition of his credit, and his relations with the company at the time of the application of Simmons for insurance. The only part of his evidence which, by implication, can be considered as relating to it, is at best but a matter of uncertainty. Between the interval of the application for insurance and the loss, he thinks, he was in the office, and they asked him to send for his policies. He does not say any thing as to the truth of the matters stated by White, as to the impossibility of the office doing business with him, in the actual state of his credit, except for money or its equivalent. Gale says that they never demanded of him payment of a premium before the delivery of a policy. White does not say that they did demand the payment of

him, but of Simmons, the person who made the application, and that the demand of him was for immediate payment.

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May, 1889.

We conclude, after weighing the evidence in this case, that whatever may have been the previous mode of doing business between Gale and the office, he, (Gale) in the state of his credit at the time of making the application for insurance, had no right to expect a continuance of it on the part of the defendants, and that the demand of the payment of the premium made by the secretary of the office, of the person who made the application for insurance, was a sufficient notice to him, Gale, that the former mode of doing business with him was discontinued, and that the payment of the premium was required before the contract of insurance would be complete.

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The insurance, as the plaintiff alleges, was effected about the 7th February. The vessel was burnt at half-past one o'clock on the morning of the 12th of that month. A sufficient time intervened to enable the party, had he been so disposed, to have closed the contract, by the payment of the premium.

It will be observed that the application was not signed by any person on behalf of the defendants. The rate of insurance was marked by the secretary, but not signed by him.

No contract is complete without the assent of both parties. In reciprocal contracts it must be expressed. *Louisiana Code, article 1759.*

Supposing that the defendants were bound by the act of the secretary, in marking on the application the rate of insurance, it by no means follows that by that circumstance the contract of insurance was complete. Consent, on their part, was not given to the contract itself. The consent was given that they would insure at the rate marked, provided the premium was paid. There is no reason for separating this memorandum from the circumstances under which it was made. White insisted on the payment of the premium; and this fact, which Simmons, in his testimony, does not pretend to controvert, shows a want of assent on the part of

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No contract is complete without the assent of the parties. In reciprocal contracts it must be expressed. In this case the assent of the defendants was wanting. The proposition to insure was accepted with a condition, which was never complied with.

the defendants to the contract of insurance. A sufficient time elapsed to have enabled the parties to correct any misunderstanding which might have existed on the subject. Neither the policy nor memorandum were delivered by the defendants, and we can see nothing in what passed between the parties, but a proposition which was accepted under a condition which was never complied with by the party who now wishes to enforce the contract. See *ante*, 249, case of *Noe vs. Taylor*.

The weakness of this part of the plaintiff's case was doubtless perceived by the counsel, and an attempt was made to fortify it, by showing the mode of doing business between the defendants and Gale (in whose name the insurance was to be made), which is stated in his testimony, and corroborated by the evidence of White. The continuance of this mode necessarily depended on the will of the parties. On the part of the defendants, it was necessarily predicated on the credit of the other party; and, at the time of making the application, Gale, after what had passed between them, had no right, as a man of business, to expect, and White, as a man of common prudence, transacting the business of others, had no right to sanction a continuance of their former mode of doing business. At all events, the notice to Simmons was sufficient to terminate it.

The judgment of the District Court is, therefore, reversed; and judgment is entered for the defendants, with costs in both courts.

GENOIS, MAYOR, ETC. *vs.* LOCKETT ET AL.

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May, 1839.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

MAYOR, ETC.

vs.

LOCKETT ET AL.

The mayor of New-Orleans, who is entrusted with the execution of the laws for the benefit of all the corporators, has the capacity to sue, and to prohibit by suit the passage or execution, by any of the municipal councils, laws, or resolutions contrary to the charter, and to test their legality.

So, the mayor may maintain an action to prohibit and restrain the officers of any of the municipalities, from doing any acts contrary to the laws of the state and in violation of the city charter.

The plaintiff alleges, that Henry Lockett, one of the defendants, being an alderman, and member of the council, was illegally employed by said council to assist the corporation attorney, in defence of a suit against the Second Municipality, for which it allowed him a fee of twenty-five hundred dollars; that the resolution allowing this fee is illegal, null and void; as, also, another resolution of said council, taking away the authority of the mayor to sign notes and obligations of the municipality, and giving it to their treasurer and comptroller, and directing them to sign a note of the municipality to Lockett for his said fee: the mayor then prays that Lockett, the recorder and aldermen of the Second Municipality, the treasurer and comptroller thereof, be cited, and after due proceedings, that the resolution giving the fee of twenty-five hundred dollars to Mr. Lockett, be declared null and void, as being contrary to the charter of the city, and in violation of the rights, duties and prerogatives of the mayor; that said Lockett be required to return said note to the treasurer, or its amount, and enjoined not to dispose of it, and the treasurer enjoined not to pay it.

The defendants excepted to the capacity and right of the mayor to institute suit, and to maintain the action in manner and form as he had commenced it.

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 MAYOR, ETC.
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The case was tried on this exception, and judgment given in favor of the defendants, dismissing the suit.

The plaintiff appealed.

Canon and Hoa, for the plaintiff.

1. The only question in this case arises on the exception to the plaintiff's capacity and right to sue. The merits were not decided on in the court below.

2. The mayor has clearly an interest sufficient to authorize him to sue ; he pays taxes to the city, and has property subject to the control and operation of its laws. But his oath of office and the powers and duties attached to his station, make it his duty to resist any infringement of the laws, and the prerogatives vested in him by law.

3. The defendant, Lockett, being a member of the council of the Second Municipality, at the time he was employed by it and allowed a fee, was not eligible to receive any compensation from the council. The payment of said fee and the resolutions of the municipality authorizing it, were contrary to the charter, &c.

4. The council of the municipality had no right to issue any note or obligation, without the signature of the mayor, under his seal of office.

Roselius, Carter and Lockett, for the defendants, were stopped in the argument ; the court being under the impression that it was unnecessary to hear an argument from that side on the merits.

Rost, J., delivered the opinion of the court.

Municipality No. 2, passed a resolution, authorizing the mayor to issue a promissory note to one of the members of their council, for services rendered by him to the said municipality, as attorney at law. The mayor, considering the resolution illegal, refused to approve and sign it. The council persisted by the majority required, and the mayor having refused to issue the note in pursuance of the resolution thus adopted, they passed another resolution, providing,

that thereafter, promissory notes and obligations to pay money, authorized to be issued by the council, bonds bearing the seal of the municipality excepted, should be signed and issued by their treasurer, and countersigned by their comptroller; and further revoking and annulling all authority heretofore given to the mayor to sign and issue notes and obligations, in behalf of this municipality.

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MAYOR, ETC.
VS.
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In conformity with this resolution, the note which the mayor had refused to issue, was issued by the treasurer.

The mayor, in his official capacity, instituted the present action against the holder of the note, the recorder and aldermen of Municipality No. 2, and also against the treasurer and comptroller, and prayed that the two resolutions above mentioned be declared null and void, as contrary to the charter; and that the holder of the note be condemned to return the same, or the amount thereof to the treasurer. He further prayed, that the holder might be enjoined not to dispose of said note, nor to discount the same, and the treasurer not to pay it at maturity.

The defendants came into court and excepted to the action as follows:

That Charles Génois, in his official capacity, had no right in law or by the ordinances of the city councils, to institute and maintain this suit in manner and form as the same is instituted, and was without authority to that effect from Municipality No. 2.

The District Court, after hearing the parties, maintained the exception, and the plaintiff appealed.

From the argument at the bar, we had supposed that the case was before the court on its merits, and the fact stated by counsel, that the note issued by the treasurer had been discounted and paid by him, before service of the citation and injunction upon him, induced us to believe, that this circumstance had defeated the action, and that nothing was left for us to act upon. The record presents a different case. Nothing is before us but the exception; and taking all the facts in the petition as true, we have merely to decide whether they give to the plaintiff, in his official capacity, a cause of

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The mayor of New - Orleans who is entrusted with the execution of laws for the benefit of all the corporators, has the capacity to sue, and to prohibit by suit the passage or execution by any of the municipal councils, laws or resolutions contrary to the charter, and to test their legality.
So, the mayor may maintain an action to prohibit and restrain the officers of any of the municipalities from doing any acts contrary to the laws of the state and in violation of the city charter.

action, independently of the circumstances which may prevent him from succeeding in this particular case.

We are satisfied that he has made out a cause of action, and that the district judge erred in maintaining the exception. The plaintiff alleges, that the ordinances which he seeks to avoid, are contrary to law ; that the note given by the treasurer, is not due by the municipality, and that the council, treasurer and comptroller have violated and continue to violate the laws of the state and the charter of the corporation, which, by virtue of his office, he is bound to see faithfully executed.

Taking these facts to be true for all the purposes of the present issue, the plaintiff is entitled to be heard. Entrusted as he is, for the common benefit of all the corporators, with power to see the charter faithfully executed, he must, in the exercise of that power, have frequent recourse to courts of justice, and has the right to test there the legality of ordinances passed by any of the councils, when a proper case occurs. We cannot prescribe to him the course which he is to pursue in the discharge of his official duties. The power to see the charter faithfully executed, being given to him, the selection of the means necessary to its exercise is left to his discretion, and we cannot interfere with them if they violate no law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, the exception overruled, and the case remanded for further proceedings ; the defendants and appellees paying the costs of this appeal.

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BACH vs. LAFAYETTE CITY COUNCIL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

BACH	
vs.	
LAFAYETTE	
CITY COUNCIL	
13	549
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A party performing his part of a contract, in good faith, will be allowed the full value of his performance, and such damages as he may sustain by a breach of the contract by the adverse party.

This is a suit for damages, for violation of a contract. It turns principally upon matters of fact. The council for defendants has urged, however, that they were never put in default according to law ; that plaintiff should have tendered to defendants such a bond as he deemed proper under the contract.

The agreement between the parties was the public adjudication made by the president of the Council of Lafayette, in pursuance of a resolution of the board, to the plaintiff, of the furnishing of a certain quantity of sand for paving.

The sand, by the terms of the resolution and advertisement, was to be delivered in such places, in the city of Lafayette, as the city surveyor should designate. The bidders, on the day of sale, were required to name the securities they intended to offer for the performance of the contract.

It appears from the evidence, that security was named by Mr. Bach ; the surety, (whose sufficiency was not objected to) has given evidence of his willingness to have served.

The city authorities, through their secretary, drew up the written contract, and an obligation of suretyship referring to the contract. This paper was submitted to Mr. Bach, who had already made considerable progress in the execution of the contract, but discovering a clause restricting the time for the completion of the work, which restriction made no part of the conditions of the adjudication, refused to sign ; but required the contract to be drawn up anew, with the omission of the obnoxious clause. The reply to this was, a resolution of the board of council requiring plaintiff to sign the contract,

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as prepared, in three days, or that another adjudication would take place at his expense ; in other words, a notification that the contract would be considered as forfeited.

The only question to be determined is, whether the defendants had the right, under the circumstances, to require the plaintiff's signature to the contract and bond which they had prepared.

It was decided they had not that right, and that they had been guilty of an active violation of the agreement, by doing and requiring something contrary to its spirit and meaning.

As to the amount which plaintiff is entitled to claim of defendants, it consists, 1st, in the value of the sand furnished by him, which, by the testimony of Mr. Buisson the surveyor, was two thousand and thirty-four cubic yards. The petition only claims two thousand cubic yards, which, at one dollar twelve and a half cents, amounts to two thousand two hundred and fifty dollars. In addition, one thousand dollars are claimed as damages. The profit which plaintiff would have made on the contract, is proved at six or seven thousand dollars. The claim must therefore be viewed as very moderate.

It was, accordingly, adjudged and decreed, that John M. Bach recover of the president and board of council of the city of Lafayette, three thousand two hundred and fifty dollars, with legal interest from the date of this judgment, and costs of suit.

The defendants appealed.

Roselius, for the plaintiff.

M'Kinney, for the defendants.

Eustis, J., delivered the opinion of the court.

This case originated from a contract for the delivery of twelve thousand cubic yards of river sand, at the price of one dollar twelve and a half cents per cubic yard.

The contract is proved, and the plaintiff was not bound to sign a new contract, or a contract varying in its terms from the original one. The resolutions of the council, under con-

sideration, put the defendants in default ; so that no notice or offer to perform was required on the part of the plaintiff.

It is proved by the testimony of the surveyor of the city of Lafayette, that two thousand and thirty-four cubic yards of sand were delivered by the plaintiff, at the place designated by the witness, and were measured by him, the witness, under an order of the council, as is proved by the testimony of the secretary.

The judgment of the court below allows the plaintiff the price of the sand delivered, and the sum of one thousand dollars damages. The claim for damages, we think, is established by the testimony of Mayfield.

The judgment of the District Court is, therefore, affirmed, with costs.

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TOWNSEND

VS.

LA. STATE MARINE AND FIRE INSURANCE CO.

TOWNSEND vs. LOUISIANA STATE MARINE AND FIRE INSURANCE COMPANY; N. AND J. WEED AND CO., AND RHOADS, WEED AND CO., SEIZING CREDITORS.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS, JUDGE WATTS PRESIDING.

The property of the debtor is the common pledge of all his creditors, and when in failing circumstances, he can make no disposition of it to the prejudice of his creditors.

So, a voluntary assignment by a debtor, which provides that a certain debt shall be paid *in full*, and the other creditors who may become parties to the act are to be paid *pro rata*, is void on its face, which may be treated as a nullity; and the property thus assigned is liable to seizure by the judgment creditors.

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INE AND FIRE
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This is an action, instituted in March, 1837, on a policy of insurance, and in March, 1839, the plaintiff obtained judgment for seven thousand three hundred and fifty dollars.

In February, 1838, Townsend, by public or notarial act, made an assignment of this claim to certain of his creditors, on particular specified conditions, which was notified to the defendants.

Two sets of creditors having obtained judgments against Townsend in the United States District Court, directed the United States marshal to seize his claim against the insurance office of the defendants during the pendency of the suit for it, and the company was notified of the seizures on the 4th of April, 1838.

When the plaintiff had final judgment, in March, 1839, a rule was taken in his name on the insurance company, to show cause why they should not pay over the amount of the judgment. The company showed for cause the seizure, under execution issued upon judgments of several creditors of Townsend. The seizing creditors also came in and made themselves parties to the rule, and claimed to hold the amount seized by them, subject to the payment of their respective claims, alleging that the assignment of Townsend is null and void.

The assignment of the claim on the insurance company is made by notarial act, and enumerates the creditors of Townsend, and then provides that the claim on the insurance company is assigned unto his above-named creditors, or any others (if such there be) who shall, within thirty days, accept this assignment, which it is understood, is made on the following conditions:

1. The funds arising from the claim on the insurance company are to be applied to the payment of all the law charges and fees of counsel in the case.

2. That the claim of Walton & Kemp be satisfied in full, with interest; the other creditors' claims coming in *pro rata*.

3. No creditor becoming a party to this act shall institute suit upon his claim for six months, and such as have brought suit are to dismiss them.

4. John Kemp to act as agent to receive and disburse the money among the creditors.

The act is signed by Townsend, and accepted by several creditors, but not by the seizing creditors.

The presiding judge sustained the claims of the seizing creditors, and considered the act of assignment as a nullity on its face, which might be so treated by creditors. The rule was made absolute for the amount due the plaintiff, over and above the claims of the seizing creditors only. From this judgment the plaintiff's agent and assignee appealed.

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Strawbridge, for the appellant, contended, that the seizing creditors of Townsend could not treat the act of assignment as a nullity. Their only recourse is by a revocatory action, to annul and set aside this instrument, if it be not valid in law. This principle has been settled in twenty different cases by this court. See 9 *Martin*, 649; 2 *Idem*, N. S., 299, 505; 3 *Idem*, 339; 5 *Idem*, 361, 633.

2. A distinction between such transfers as the present, by private and authentic act, has been made in later decisions, but the doctrine beyond this has never been impugned, in the many cases that have come before this court. 6 *Martin*, N. S., 137, 324, 581. 4 *Louisiana Reports*, 340-1.

C. M. and F. B. Conrad, for the insurance company, stated that it had no other interest in this matter than as a mere stake-holder of the amount in dispute among the creditors of Townsend.

Maybin, for the seizing creditors, insisted that the assignment of Townsend was void, because made when he was in insolvent circumstances, and he could not legally change his situation, or make a disposition of his property to the injury of his creditors. Actual insolvency, in this case, is the same as declared insolvency. See *Louisiana Code*, 1964-5, 1979, 1984 and 3150; 2 *Martin*, N. S., 66; 5 *Idem*, 620; 1 *Louisiana Reports*, 500; 2 *Idem*, 16.

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BRY vs. WOODROOFF.

BRY
vs.
WOODROOFF.

APPEAL FROM THE COMMERCIAL COURT FOR THE CITY OF NEW-ORLEANS,
JUDGE WATTS PRESIDING.

Where an act of the legislature creating the office of president of the board of public works, provides "that the governor as soon as may be, after the passage of this act, and every two years thereafter, shall nominate and appoint, etc., a president of the board of public works:" *Held*, that the word *thereafter*, referred to its first antecedent, *to wit*, the *passage of the act*, and that the *duration* of the office is to be reckoned every second year from the date of the act, and a new appointment made accordingly.

The Hon. Henry Bry, was appointed president of the board of public works by the governor and senate, to take effect the 18th April, 1839; and at the time designated in his commission, applied to the Hon. C. Woodrooff, his predecessor, for the archives of the office, and to be admitted to the full exercise and control of all the duties and functions thereof. The latter refused to surrender the office, alleging that his term was unexpired.

The new president applied to the Honorable the Commercial Court, and took a *mandamus nisi*, on the defendant, to which he showed cause, but on hearing the parties, the *mandamus* was made peremptory, and the defendant appealed.

The case is so fully stated and expounded by the learned judge presiding in the court, *a qua*, that his opinion is given as containing a full report of it.

"The act to amend an act, entitled an act to incorporate a board of public works, etc., was approved on the 10th March, 1837. This act created a *president* of the board of public works. The second section reads as follows:

"That the governor, *as soon as may be after the passage of this act, and every two years thereafter*, shall nominate and appoint, by and with the advice and consent of the senate, a president of the board of public works.

"On the 10th March, 1837, the governor nominated to the senate, Claudius Crozat, as president of the board of public works.

"On the 13th March, 1837, being, as appears by the journals, the last day of the session of the senate, the senate informed the governor that they did not approve of the nomination of C. Crozat.

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"On the 18th April, 1837, during the recess of the legislature, the governor appointed Clark Woodrooff, as president of the board of public works.

"On 22d January, 1838, the governor submitted to the senate, among the nomination of officers appointed during the recess, Clark Woodrooff, to be president of the board of public works.

"On the 12th March, 1838, the senate confirmed this nomination.

"On 12th March, 1839, the governor submitted to the senate the nomination of Henry Bry, to be president of the board of public works, and 'to go into office on the 18th April, 1839, at which time the commission of the present incumbent will expire.' On the same day the nomination was approved by the senate.

"The petitioner claims the office from the 18th April, 1839, and the defendant contends that his appointment lasts for two years from 12th March, 1838, when his nomination was confirmed by the senate.

"Two questions are raised : 1st. When does the biennial term of this office commence ?

"2d. What was the legality and effect of the appointment made during the recess of the legislature, on the 18th April, 1837 ?

"In offices for terms of years, it is important that they should have a fixed date of commencement and termination. The want of it as to the various important offices, was remedied by the act, approved 11th February, 1835. 1 *Moreau's Digest*, 19.

"I am of opinion, that by the force and effect of the section of the act creating a president of the board of public works, the date of commencement of the office is from 10th March, 1837. The words are, 'That the governor, as soon as may be after the passage of this act, and every two years there-

EASTERN DIST. *after, shall appoint,' etc.* The word *thereafter*, as it appears
 May, 1839. to me, refers to the passage of the act, and gives a fixed date
 for the commencement and termination of this biennial
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"If this opinion on this point is correct, it is conclusive of the whole case, and the appointment of the first incumbent of the office, terminated on 10th March, 1839; as there is no authority to hold over.

"But as the other point is the one relied on by the parties, I shall proceed to give an opinion in relation to it.

"I am aware that it has been a common opinion, that in order that a governor may have the power of appointment, it is necessary that the vacancy should have occurred since the last session of the legislature. This opinion, appears to me, to have arisen under an erroneous impression of the meaning of the word '*happen*,' used in the constitution.

"The words are, 'The governor shall have power to fill up vacancies that *may happen* during the recess of the legislature, by granting commissions which shall expire at the end of the next session.'

"As an evidence how easily the most celebrated philologists may commit gross errors, Dr. Johnson in his definition of the meaning of the preposition '*from*,' says that it sometimes means motion, and gives as an instance, '*Figs come from Turkey*;' and that it sometimes means rest, and gives as an instance, '*The lamp hangs from the ceiling*.' Home Tooke detects the fallacy of this reasoning, by showing that in the first question, the idea of motion is implied in the word *comes*; and in the second question, the idea of rest is implied in the word *hangs*, and that the word *from*, has no connection with either idea.

"Because the word *happen* is frequently used in connection with *casualty*, it is supposed always to imply a casualty.

"It is evident that this is the source of the mistaken opinion referred to, as it is expressly put on this ground in the decision of the senate of the United States, cited in 3 Story, 411, on the Constitution of the United States.

"But that the word *happen* does not necessarily imply this

idea, is clear from the dictionary of Crabb, the most accurate philologist of our language: 'To happen, chance.' 'To happen, that is, to fall out by a *hap* is to *chance*. (See chance, fortune,) as the genus to the species; whatever *chances*, *happens*, but not *vice versa*. *Happen* respects all events, without including any collateral idea; *chance* comprehends, likewise, the idea of the cause and order of events: whatever comes to pass *happens*, whether regularly in the course of things, or particularly and out of the order; whatever *chances*, *happens* altogether without concert, intention, and often without relation to any other thing.'

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" 'Accidents *happen* daily which no human foresight could prevent: the newspapers contain an account of all that *happens* in the course of the day or week; listeners and busy bodies are ready to catch every word that chances to fall in their hearing.' See *Crabb's Synonymes*, words, *happen*, *chance*.

" The inference is, that whenever or from whatever cause a vacancy exists, it is the duty and the power of the executive to fill it. It is enough that the vacancy *exists*, to confer this power and right to appoint during the recess.

" And the second section of the act of 5th September, 1812, 1 *Moreau's Digest*, 18, is only declaratory of the true construction of the constitution. The section is, 'That the governor be, and he is hereby authorized to fill all vacancies that may exist during the recess of the legislature, by commissions to expire at the end of the next session thereafter.'

" Though the law has an independent effect as to offices which are filled by joint ballot, or otherwise: the construction thus given is ably sustained by the opinions of Mr. Attorney General Wirt, in 1823, and Mr. Attorney General Taney, in 1832, in the case of Gwynn, which are contained in *Niles' Register* for 1832.

" The argument from the danger of the abuse of this power, and the necessity of its existence, is here ably answered and proved. Story, in his 3d volume of *Commentaries on Constitution of the United States*, 411, only reports the decision of the senate, without giving it the sanction of his own opinion.

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"Judge Story's book was published in 1833, and does not notice the opinions of Wirt and Taney, above referred to.

"The appointment of the defendant on the 18th April, 1837, was, therefore, strictly constitutional, and I do not consider that the section of the act of 10th March, 1837, limits the appointment of the president of the board of public works, to the case where it is at once confirmed by the senate.

"The nomination on 12th March, 1838, is in terms a continuation of the appointment of 18th April, 1837.

"In whatever light it is to be considered, there, it appears to me, that the term of office of the defendant is expired, and that the plaintiff is entitled to fill the office in question, though I repeat I am of opinion that the term of this office is from 10th March, 1837, and for every two years thereafter.

"It is, therefore, considered, that a peremptory *mandamus* be issued to the defendant, Clark Woodrooff, commanding him to deliver to the plaintiff, Henry Bry, the office of president of the board of public works, and all the papers, books, documents, plans, etc., thereunto belonging, and that said defendant pay the costs of these proceedings."

The case was submitted to this court by *Mr. Mazureau*, of counsel for the plaintiff.

Hon. C. Woodrooff, in propria personâ, denied the plaintiff's capacity to sue for and claim the office which he seeks, because it has not been constitutionally or legally conferred on him.

2. He admits the existence of the law under which the plaintiff claims to be appointed, and all the material facts alleged, abstractly; but he insists that he was appointed by the governor in the recess of the senate, in the month of April, 1837, *temporarily*, and his commission was to expire at the end of the next session; that in truth and in reality the office had never been filled under the provisions of the act of March, 1837, and could not strictly be said ever to have

become vacant during the recess of the legislature ; and that the executive appointment, was not expressly warranted by law or the constitution, but grew out of the necessity of the case. His subsequent appointment by the governor and senate in March, 1838, was made for the purpose of confirming any of his acts, which might be deemed illegal during the executive appointment, &c.

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3. He contends that he holds the office by an appointment of the governor and senate, on the 12th March, 1838, as evidenced by his commission, and that under the act of the legislature he is entitled to hold the office *two* years from the date of this appointment ; it being the only one that has ever been legally made. The words of the act are, that "as soon as may be after the passage of this act, and every two years thereafter, the governor shall appoint a president of the board of public works, &c," and these words must be applied to the appointment of the governor and senate, as the only legal one that has been made.

4. This appointment is not a mere sanction given by the senate, of the executive appointment, as is contended for ; but it is a distinct, complete and separate act of the appointing power by the joint action of the executive and one of the branches of the legislative department. An executive appointment is complete by the action of the governor alone. It requires no confirmation, and the commission under it expires at the end of the next session. *Constitution of Louisiana, art. 3, sec. 10.*

5. The plaintiff could not constitutionally receive an appointment to vacate a commission held under a valid and legal appointment ; and the governor and senate have no authority to displace an officer before the official tenure of the office expires. If the plaintiff holds any commission as president of the board of public works, to take effect prior to the 12th March, 1840, it is utterly null and void for want of authority in the appointing power.

Martin, J., delivered the opinion of the court.

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The defendant is appellant from a judgment ordering a peremptory *mandamus* against him, for the delivery of "the office of president of the board of public works, and all the papers, books, documents, plans, &c., thereunto belonging," to the plaintiff.

The question turns upon the legality of the plaintiff's appointment to the office he claims. It was created by an act of the legislature, approved the 10th of March, 1837, the second section of which directs, "that the governor, as soon as may be after the passage of this act, and every two years thereafter, shall nominate and appoint, by and with the advice and consent of the senate, a president of the board of public works." No appointment, however, took place under this act until after the adjournment of the legislature; and afterwards, to wit, on the 18th of April, 1837, the governor gave a temporary commission to the defendant. On the 12th March, 1838, his nomination was submitted to the senate and approved, and he received a commission accordingly. On the 12th March, 1839, the plaintiff, with the advice and consent of the senate, was appointed, and his commission expresses that he is "to go into office on the 18th of April, 1839, at which time the commission of the present incumbent will expire." On the 30th April, the defendant having refused to surrender the office, the plaintiff made application for a *mandamus*.

The judge *a quo*, after having heard the parties, ordered a peremptory *mandamus*, and the defendant appealed.

The inferior court was of opinion that the legislature had directed the appointment to be made every second year after the 10th of March, 1837.

It does not appear to us that the court erred. The word "thereafter," in the second section of the act cited, can have reference to two periods only, viz., the date of the act, or that of the first appointment under it.

The commission of the plaintiff assumes, that the date of the first appointment was the 18th of April, 1837. The defendant admits this, but he contends that the office is biennial, and its duration is to be reckoned from the 12th

March, 1838, the date of his second appointment. The counsel for the plaintiff urges that the defendant's first appointment must be disregarded, as unconstitutional, the governor having filled the vacancy, which did not happen in the recess of the legislature. Our learned brother of the inferior court has been of opinion that the governor may fill all vacancies that exist in the recess. In this he thinks himself supported by an act of the legislature passed the 12th September, 1812. 1 *Moreau's Digest*, 18.

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This is a question of great importance, and we have been prevented from examining it by the consideration that it is not necessary to be acted upon in the present case.

The legislature has not expressly made the tenure of the office under consideration biennial. It has said nothing of the tenure, but has spoken only of the appointment, which it has required to be made biennially. We have therefore to consider, only, whether the appointment is to take place in every second year, on the 10th of March, the day of the date of the act; the 18th of April, the date of the defendant's first commission; or the 12th March, 1838, the date of his second commission.

The judge *a quo* correctly concluded that the duration of the office is to be reckoned from the 10th of March every second year, because this date is a certain one, and any other must be sought by computation, and be liable to variation. The word "thereafter," in the act, refers to its first antecedent, to wit, the passage of the act. The judge *a quo* correctly observes, that in offices for terms of years it is important that they should have a fixed date of commencement and termination. The want of it, as to various important offices, was remedied by the act approved the 11th of February, 1825, making these offices expire on a fixed day periodically, according to their duration. 1 *Moreau's Digest*, 19.

It is, therefore, ordered, adjudged and decreed, that the judgment of the inferior court be affirmed, with costs.

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SYNDIC, ETC.

ARMSTRONGS vs. BALDWIN, SYNDIC, &c.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

A party must be put in default before damages can be claimed, for the non-compliance of a reciprocal obligation.

Where an act of pledge transfers to the pledgee all the pledgor's rights and interest to certain notes secured by mortgage, subrogating him to all his rights of proceeding by the executory process to enforce payment of the notes, the pledgee may have his order of seizure and sale in the same manner as the pledgor could have had.

This is an opposition to executory process. The defendant in the opposition, Joshua Baldwin, syndic of the creditors of Thomas C. Swain and brothers, took out an order of seizure and sale on one of three promissory notes secured by mortgage on the property seized; drawn by C. & A. Armstrong, the present plaintiffs. The Armstrongs executed this note, together with two others "*drawn to the order of and endorsed by J. R. Pully,*" dated the 12th January, 1837, and payable in twelve, eighteen and twenty-four months. These notes were given in payment of the price of two city lots which they purchased from one Henry C. Myers. In the act of sale, Myers sells and transfers sixty shares of stock in the Citizens' Bank to the purchasers, subscribed and held on said lots, and binds himself to make such other transfer whenever thereto required, as may be necessary and required by the rules and regulations of the bank. No other transfer was ever made; there is no evidence that Myers was ever called on to make it. Myers was allowed to keep possession of the property under a lease to the Armstrongs. On the 8th of August following, Myers executed an act of pledge before a notary, in which he pledged and pawned said notes to Joshua Baldwin, syndic of the creditors of Thomas C. Swain and brothers, and in case they "*were not punctually paid at maturity,*" he, the said Myers, transfers to the said Baldwin, syndic, &c. all his rights under the above act of mortgage, particularly

subrogating the said Baldwin to all his rights of proceeding by executory process to enforce payment of said notes by seizure and sale of the mortgaged premises."

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The plaintiffs allege, that they never had notice of this pledge to Baldwin, and are entitled to all equities and offsets against Myers, and that they have a claim of five hundred dollars for rent due by him, which they ask to be credited on the note, together with twelve hundred dollars, for the profit which the stock in the Citizens' Bank will readily sell for if transferred. They allege several other matters in defence, such as irregularities in the executory proceedings, &c., and pray for an injunction to restrain the sale and prohibit all further proceedings, until Myers transfers the sixty shares of stock, and their credits are allowed on the note sued on.

On the trial of the opposition and injunction, the district judge was of opinion that the ownership of the notes in question was still in Myers, the pledgor, qualified by the pledge it was true, but in no manner extinguished. The suit should have been brought in the name of Myers. Judgment was rendered, perpetuating the injunction, and the defendant appealed.

Schmidt, for the plaintiffs in injunction.

Strawbridge, contra.

Rost, J. delivered the opinion of the court.

The petitioners gave their three several promissory notes to the order of, and endorsed by, J. R. Pully to one Henry C. Myers, for the purchase of real estate. Their vendor retained possession of the estate under a lease, and moreover bound himself to transfer to them sixty shares of the stock of the Citizens' Bank, secured by mortgage upon it; which transfer he has failed to make. Myers pledged their notes to the defendant before they became due, as collateral security on a purchase of town property. The defendant took an order of seizure upon the first of those notes, and the real estate for which they had been given was seized and advertised to

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be sold. The plaintiffs alleging that Myers was justly indebted to them in the sum of seventeen hundred dollars for rent and damages for having failed to transfer the stock, enjoined the sale and prayed that the defendant might be ordered to allow them in compensation the sum they claimed, and that he might further be inhibited from all further proceedings, until Myers had transferred the bank stock to them.

The defendant pleaded the general issue, and the case having been tried in the first instance, the injunction was made perpetual without prejudice to the rights of the defendant to institute all suits for the same cause of action, in the name of H. C. Myers, and for the use of the creditors of the insolvents he represented. The defendant appealed.

The three notes of the plaintiffs were negotiable, and the evidence shows that they were pledged to the defendant before their maturity. Not being at that time due and demandable, no compensation could take place between them and the plaintiffs' claim for rent. If the notes had been due, the damages could not have been compensated with them, because they were not liquidated, and because moreover the plaintiffs have failed to show that they had put Myers in default.

A party must be put in default before damages can be claimed for the non-compliance of a reciprocal obligation.

Where an act of pledge transfers to the pledgee all the pledgor's rights and interest to certain notes, secured by mortgage, subrogating him to all his rights of proceeding by the executory process to enforce payment of the notes, the pledgee may have his order of seizure and sale in the same manner as the pledgor could have had.

The district judge was of opinion that the defendant could not take an order of seizure in his own name, but must proceed in the name of Myers, for the use of the creditors of the insolvents he represents.

The plaintiffs pray for no relief on that account, and if they did, it appears to us that the act of pledge fully justifies the proceeding of the defendant. It provides that if the notes are not paid at maturity, *Myers transfers to the defendant all his rights under the act of mortgage, and subrogates him particularly to all his rights of proceeding by executory process to enforce the payment of the notes by seizure and sale of the mortgaged premises.* This provision precludes the idea that proceedings were intended to be carried on in the name of Myers. The necessary effect of the subrogation is to put the defendant in his place. The plaintiffs had no cause of action and the judgment must be reversed.

It is therefore ordered and adjudged, that the judgment of the district court be avoided and reversed and the injunction dissolved, with costs in both courts ; and interest at the rate of ten per cent. per annum on three thousand dollars, from the 12th January, 1838, till paid.

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OAKLEY ET. AL. vs. MISSISSIPPI AND ALABAMA RAILROAD COMPANY, ET. AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE BUCHANAN PRESIDING.

On an appeal from an order making a rule absolute, requiring garnishees to pay money and effects due by them to the defendant, over to the sheriff, subject to the order of court: *Held*, that no answer to the rule in writing is required. Their liability is to be tested by their answers to interrogatories.

An attaching creditor cannot compel the garnishee to pay a debt due by him as such into court, even after judgment against the defendant.

The order in which previous attachments are to be paid, must be first ascertained before the last attaching creditor can obtain judgment against the garnishee.

This is an action instituted by attachment on fifteen promissory notes, issued by the defendants at their banking house in the town of Brandon, in the state of Mississippi, commonly called bank notes, amounting to eleven thousand dollars; and property, money and effects attached, in the hands of Harris, Lyons & Co., E. Yorke, and J. Minturn, in New-Orleans, to a very large amount, who were summoned as garnishees. They answered the interrogatories propounded to them, touching the property and effects of the defendants in their hands fully, and stated that several other attachments had been previously levied on the same property.

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On the 9th January, 1839, the plaintiffs had judgment against the defendants for the amount of their claim, which was signed on the 12th; on the 11th January, they took a rule on the garnishee to show cause why they should not pay over to the sheriff, to be held subject to the order of court, the amount of property, goods, rights, credits, moneys and effects, which they confessed by their answers to interrogatories to be in their hands as garnishees, belonging to the defendants.

On the day fixed, the parties appeared and the rule was tried; and after hearing arguments of counsel, it was made absolute; and the garnishees appealed.

G. B. Duncan, for the plaintiffs, contended, that the appeal should be dismissed, because the judgment was not such a one as authorized an appeal. No appeal lies from an order, or judgment requiring garnishees to pay money into court; especially when they, by their answers, confess that it is in their possession. *Code of Practice*, 567.

2. The garnishees acknowledge there is a large amount in their hands of property, effects and moneys belonging to the defendants, but which is attached by various creditors. The plaintiffs, therefore, have the right to protect their interests, and have these funds and effects placed in the hands of the sheriff, subject to such order as the court shall make in the case. This they have a right to require; at least to have a sufficient amount placed within the protection of the court to meet their demand and to pay all prior attaching creditors.

Strawbridge and *Peirce*, for the appellants, insisted that garnishees were not required to pay over moneys or effects in their possession which were contested among creditors, until it was finally settled contradictorily with the contending creditors, to whom payment was to be made and the amount thereof.

2. The garnishees are expressly authorized to keep possession of the property attached until the end of the contest. *Code of Practice*, 257.

Rest, J., delivered the opinion of the court.

The plaintiffs proceeded against the defendants by attachment, and prayed that Edward Yorke and John Minturn might be cited as garnishees, and compelled to answer certain interrogatories contained in their petition. The garnishees answered, and filed with their answer their general account current with the defendants, showing a balance of sixty-one thousand seven hundred and thirty-two dollars eighty-six cents, due in money by the said garnishees to the said defendants, at the time the attachment was levied. They further answered that they had sold six hundred and sixty-two bales of cotton, delivered to them by order of the district court as the property of the defendants, the proceeds to be held subject to the order of the court, in four previous attachments, upon claims amounting together to forty-two thousand five hundred dollars, which proceeds had not yet come to their hands, but would probably amount to the further sum of twenty thousand dollars. They finally stated that previous attachments, which they particularly described, had been levied upon the said balance due and cotton, for claims against the defendants, amounting together to eighty three thousand five hundred and sixty-four dollars thirty-four cents.

The debt due by the garnishees and the credits in their hands were attached; and the plaintiffs having obtained a judgment against the defendants, took a rule upon the garnishees to show cause why they should not pay over to the sheriff of the parish of Orleans, to be held subject to the order of the court, the amount of property, goods, rights, credits, moneys and effects, by them in their answers as garnishees, confessed to be in their possession, belonging to the defendants, on the ground that the plaintiffs having attached said property, had thereby an interest therein which they wished to protect by all legal means.

The garnishees filed no answer to the rule, but they appeared by counsel on the day fixed for the return, and it was tried contradictorily with them. The court made the rule absolute, and the garnishees, John Minturn and Edward Yorke, after an unsuccessful attempt to obtain a new trial, took the present appeal.

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On an appeal from an order making a rule absolute, requiring garnishees to pay money and effects due by them to the defendant, over to the sheriff, subject to the order of court: *Held*, that no answer to the rule in writing is required. Their liability is to be tested by their answers to interrogatories.

An attaching creditor cannot compel the garnishee to pay a debt due by him as such into court, even after judgment against the defendant.

The order in which previous attachments are to be paid, must be first ascertained before the last attaching creditor can obtain judgment against the garnishee.

Our laws do not require an answer in writing to rules taken against garnishees. Their appearance by counsel on the day of the trial is sufficient, and was so held by the court below.

The extent of their liability is to be tested by their answers to interrogatories, when the truth of those interrogatories has not been disproved.

It is not shown that the proceeds of the cotton sold by the garnishees had come to their hands, and until that fact was established, no rule could be made absolute against them for that part of the effects attached. Article 257 of the Code of Practice, provides that the sheriff must take charge and keep possession of all the goods and effects which he may have attached, with the exception of such sums of money as may be due by the garnishee. Whatever the sheriff is directed to take into his possession, may probably be ordered to be brought into court; but this does not extend to the amount of a debt due by the garnishee. It is a safe rule to adopt, that the attaching creditor does not acquire greater rights against the garnishee than the defendant himself possesses; and as the defendant in an action against the garnishee for a debt due, could not compel him to bring the sum claimed into court, even after judgment, the attaching creditor cannot enjoy that privilege.

Where the garnishee is about to leave the state, he may, under certain circumstances, be arrested and held to bail, as other defendants; and the law places it in his power to release himself by giving security or by depositing the funds in court. Under the judgment rendered in this case, the situation of the garnishee would be worse than if he had been held to bail; for he could not give security, but must bring the money into court, there to await the inevitable delays of the law; and the sum which he is ordered to bring into court, is ten times as much as would suffice to pay the plaintiffs' claim.

We are of opinion this cannot be done: The plaintiffs were fully informed of the previous attachments, and the order in which those attachments are to be paid, must be

ascertained before they can obtain judgment against the garnishee; under those judgments they must proceed as they would have to do against any other defendants.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, the rule dismissed, and the case remanded to be proceeded in according to law, the plaintiff and appellees paying the costs of this appeal.

Eustis J.—I assent to the judgment of the court in this case, reversing the judgment of the district court, but not to all the reasons on which the opinion is founded.

MOORE ET AL. vs. PONTALBA.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
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A final judgment has the effect to exclude any adverse possession, within the boundaries it establishes; any subsequent possession must be by enclosures, or under a new title, to avail the party.

The confirmation of a land claim is not a new title, and will not avail the claimant for the possession, against a confirmation previously made by the board of commissioners, of which the claimant had notice.

Where a party purchases without warranty, and without ever taking possession under his title, he must be presumed to be cognizant of the defects of the possession and title of his vendor.

This is a possessory action, instituted by an injunction to prevent the sale of a tract of land, laid out into lots adjoining the city of New-Orleans, by the agent of Madame Pontalba, which is claimed by the plaintiffs, and of which they allege they were possessed as owners.

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The defendant averred she was in the legal possession of said tract of land, as owner, under a good and authentic title, and she prays that the injunction be dissolved, with heavy damages allowed her.

The case was submitted to the district judge on a mass of testimony, who gave judgment for the defendant. The plaintiffs appealed.

D. Seghers, Grima and Preston, for the plaintiffs.

L. Janin, Soulé and Derbigny, for the defendant.

Rost, J., delivered the opinion of the court.

The plaintiffs alleged that they were disturbed in their possession of a certain tract of land which they held and possessed by a regular chain of conveyances from J. B. Macarty, to whom it had been granted in 1795, by the Baron de Carondelet, then governor of the province of Louisiana, and that the agents of the defendant had caused the same to be advertised to be sold in lots, at public auction, as her property.

The court of the first instance, enjoined the sale on their application.

The defendant pleaded the general issue, denied the plaintiff's possession, and averred that herself and her father, André Almonaster y Roxas, before her, had been in open, peaceable and uninterrupted possession thereof, since the year 1782. Judgment was given against the plaintiffs, as in case of non-suit, and they appealed.

After a careful examination of the proceedings and evidence, the court considering that the fact of cutting fire-wood upon the land in controversy, cannot be held as a distinct act of ownership, when it is shown that the inhabitants of the city of New-Orleans have always been in the habit of using that wood, as well as the plaintiffs' vendors. That the only distinct act of possession shown by the plaintiffs, to wit: the authorization given by them to the New-Orleans and Nashville Rail Road Company to pass through the land, was done within the year that preceeded the

inception of this suit, and that they have failed to establish the possession of one year, required by law to maintain a possessory action.

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That, on the contrary, the defendant has shown, that as far back as 1796, Almonaster, her father, instituted a petitory action against J. B. Macarty, for the land in controversy, alleging that he had been in possession at that time, for more than thirty years, which action appears to have been discontinued upon the judicial declaration of the defendant, disclaiming title and possession.

That in 1806, her claim was duly presented to the board of commissioners, and confirmed to the extent and under the boundaries now claimed by her; while that of the plaintiff was rejected at that time, and was not confirmed until the year 1823.

That in the year 1821, the mayor, aldermen and inhabitants of the city of New-Orleans, having taken actual possession of part of said land, under a sale from Macarty, the defendant instituted an action against them, in which their vendor, called in warranty, pleaded the title under which the plaintiffs now claim, and a judgment, which has since become final, was rendered against him.

That the said suit and judgment, viewed as acts of ownership, had the effect of excluding any adverse possession, under J. B. Macarty's title, within the boundaries of Almonaster's claim. That if the plaintiffs have possessed since, their possession must have been under enclosures before it can avail them, unless they have acquired a new title.

That the confirmation of their claim in 1823, is not a new title, and if it was, would not avail them for the possession, against a confirmation previously made by the board of commissioners, and of which Macarty had notice.

That the plaintiffs having purchased without warranty, and without ever having taken possession under their title, must be presumed to be cognizant of the defects of the possession and title of their vendors.

A final judgment has the effect to exclude any adverse possession, within the boundaries it establishes; any subsequent possession must be by enclosures or under a new title, to avail the party.

The confirmation of a land claim, is not a new title, and will not avail the claimant for the possession against a confirmation previously made by the board of commissioners, of which the claimant had notice.

Where a party purchases without warranty and without ever taking possession under his title, he must be presumed to be cognizant of the defects of the possession and title of his vendor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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taken place in relation to the appeal in this cause, I believe the Supreme Court will agree with me, that the appeal is at present merely devolutive. To obtain a suspensive appeal, the party appealing must furnish his security within ten days after the notification of the judgment. *Code of Practice*, 578. *7 Louisiana Reports*, 448. If insufficient security be given, it is the same as if no security is given. The appellant must furnish, at his peril, a security having the legal requisites. The uniform practice of the court has been to grant the order of appeal filled up with such name as the appellant designates. This security is thereafter to be justified, if called in question. It would require too much trouble, and would be a waste of time, to require proof before signing the order. By considering the subject in this light, the appellee loses no right, if the court has been surprised (as in the present instance) into signing an order filled up with the name of an insolvent, worthless surety.

In this case, the bond, on the strength of which the defendant has applied for a *mandamus*, and seeks to have a stay of execution, was filed twenty-eight days after the notice of judgment."

On an appeal from a judgment, execution may be stayed, provided the appeal be taken within ten days after the notification of the judgment, and provided the appellant gives his obligation, with a good solvent security residing within the jurisdiction of the court, in favor of the appellee, for a sum, and conditioned as provided in the articles 575, 576 and 577, of the Code of Practice. Such we understand to be the proper construction of the article 575.

The party praying a *suspensive* appeal, must within ten days after the notification of the judgment give his obligation with a good and solvent surety, residing in the jurisdiction of the court for the sum required by law.

The article 578 provides that the appellant must offer to give such security as the court may direct, as afterwards provided in the Code of Practice.

We believe the uniform practice has been, for the judge to take the surety offered by the party; any other mode of acting, as the judge is not empowered in the last resort to determine on the sufficiency of the surety, would be attended with unnecessary inconvenience.

The appellant is bound to furnish good and solvent security

within the time provided ; this is a condition which is to be performed by him, without which execution cannot be stayed. He is bound to know the solvency of the person whom he presents to the judge as willing to contract the obligation for him. It is in vain to contend, that, in point of fact, the appellant can be supposed to be ignorant of the situation of his surety. He offers him as a person good and solvent, the judge receives the surety as such on his representation, without prejudice to the rights of the appellee, who can insist on having the security which the law requires, or in default thereof, execution on his judgment. If the surety given be not good and solvent, the condition has not been complied with, through the fault of the appellant ; and we think the appellee is entitled to have his execution. The rule is therefore discharged.

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The appellant must offer to the judge a *good and sufficient* surety who is bound to receive the security offered ; but if he is shown to be insufficient, the condition has not been complied with through the fault of the appellant, and the appellee is entitled to his execution.

So, if the surety in a suspensive appeal bond is shown to be insufficient, the appellee may have his execution immediately.

BATRE, ET. AL. VS. LOUISIANA INSURANCE COMPANY.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where the insured settled with the underwriters for a partial loss and gave up their policy, without notifying them of a claim pending in the admiralty court for salvage, which, if successful, would increase the loss : *Held*, that the insured cannot recover of the insurers for any further loss they may sustain on account of salvage decreed to the salvors.

Had the insured notified the insurers at the time of the settlement, of this outstanding claim, a different case would have presented itself.

This is an action for additional loss sustained on a lot of merchandize, insured by the defendants in the brig Hope, which was wrecked on her return voyage from Havana to Mobile, in January, 1832. Soon afterwards, the plaintiffs adjusted their loss with the Louisiana Insurance Office, at

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about fifteen hundred dollars; gave a receipt therefor, and returned the policy of insurance. In the meantime, suit had been instituted (by the pilots and others who saved the vessel and cargo from total ruin, when stranded near Mobile point,) in the Court of Admiralty for salvage, and the court awarded them one-third of the value of the ship and cargo, which were valued at fifteen thousand two hundred and ninety-nine dollars fifty-eight cents, which decree was affirmed by the Supreme Court of the United States. See 10, *Peters' Reports*, 108.

The plaintiffs share of this loss amounted to one thousand two hundred and sixty-five dollars sixty-two cents, for which they claim judgment against the defendants; the amount being still covered by the policy of insurance, but which they had already given up on the former settlement.

The defendants pleaded a general denial. It appears from the evidence of this case, that the *insurers* were never apprised of the pendency of the suit for salvage, and no mention was made of it in settling the former claim of the plaintiffs.

The parish judge gave judgment for the plaintiffs, and the defendants appealed.

Benjamin, for the plaintiffs, insisted that the amount claimed was for a loss happening by a peril insured against. It was not known at the former settlement and adjustment of accounts, and could not then be adjusted.

Strawbridge, contra, contended that the mere delivery up and possession of the policy by the defendants, furnishes a presumption of payment or remission of the debt. *Louisiana Code*, 2195.

2. Where a settlement takes place and the policy surrendered, it is an adjustment, *technically* so called. *Phillips on Insurance*, 500. Such an adjustment cannot be set aside, but for fraud or a mistake of facts unknown at the time. Here the plaintiffs knew of the pendency of the suit for salvage, and failed to notify the defendants. *Phillips*, 501.

Eustis, J., delivered the opinion of the court.

The plaintiffs, residing in Mobile, Alabama, on the 16th of January, 1832, effected insurance with the defendants on merchandize shipped on board the *Hope*, for the sum of two thousand seven hundred and fifty dollars: a loss having occurred, the claim of the plaintiffs was adjusted by the defendants in the sum of fifteen hundred dollars, which was paid, and the policy was delivered up. Previous to the adjustment, a libel had been filed against the *Hope* and cargo for salvage, (which had been made on the voyage insured,) in the District Court of the United States for the Southern District of Alabama. Judgment was rendered for the libelants, and the plaintiffs, claimants in the suit in admiralty, took an appeal to the Supreme Court of the United States, in which the decree of the court below was affirmed. The plaintiffs having been bound to pay this judgment, and having paid it, have brought suit against the insurers; they allege that this matter was not included in the adjustment made in 1832, and that the policy was delivered up to the insurers under the erroneous impression that the salvage claimed was unfounded and could not be sustained. The receipt on the policy is for one thousand five hundred and five dollars forty-two cents in full, for loss stated above; and by the statement it does not appear that this claim for salvage is expressly included; a claim for salvage was included, which had no connection with that which was the subject of the suit in admiralty.

There is no evidence which proves that the defendants had notice of this suit, which it appears the plaintiffs conducted entirely in their own way and on their own account. Had they notified the defendants, at the time of the settlement, of this outstanding claim, a different case would have presented itself; but construing the agreement as the plaintiffs themselves have executed it, we must consider it as conclusive on their claims under the policy. Had they considered the suit in the admiralty court of Mobile to have been conducted by them on account of the underwriters, is it possible that they would not have notified them of its exis-

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Had the insured notified the insurers at the time of the settlement of this outstanding claim, a different case would have presented itself.

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tence, and as prudent men, have consulted them as to its management, and have called upon them for the expenditures incident to it? We are forced to the conclusion that the plaintiffs have no claim whatever on the defendants for the causes set forth in their petition. The judgment of the parish court is, therefore, reversed, and judgment is entered for the defendants, with costs in both courts.

BARELLI ET AL. VS. HAGAN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

A general average contribution, arises from a sacrifice deliberately made of property of one of the parties in the adventure, for the benefit of the others, whereby his loss is their gain.

The owners of slaves are bound to contribute for them to a general average, occasioned by a jettison from the ship in which they are shipped, and on board at the time.

This is an action by the agents and consignees of the brig Chapman, for contribution to a general average, occasioned by a jettison, for the preservation and safety of said vessel, which got on the rocks on the coast of Florida, in her voyage from Charleston to New-Orleans, in December, 1837.

The plaintiffs allege, that the loss by the jettison was three thousand two hundred and ninety dollars; that the defendant had twelve slaves on board, worth six thousand dollars, and his proportion amounts to nine hundred and forty-eight dollars and seventy cents, for which they pray judgment.

The defendant pleaded the general issue. The loss was proved, and the principal question to be decided, is the *owner of slaves* liable to contribute to the general average loss in a case like this?

The district judge decided in the affirmative, and the defendant appealed.

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Watts, for plaintiff, cited *Abbott on Shipping*, page 356, and authorities there referred to, in support of the case.

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R. Hunt, for the appellant.

Eustis, J., delivered the opinion of the court.

This is an action against the defendant for contribution to a general average, occasioned by a jettison from the brig Chapman, while on the rocks on the coast of Florida, on her voyage from Charleston to this port. The defendant had on board the Chapman, twelve slaves; they were shipped under a bill of lading.

The only point presented to our consideration by the counsel is, that of the liabilities of slaves to a general average contribution, for goods necessarily thrown overboard at sea, for the general benefit.

A claim for a general average contribution, arises from a sacrifice deliberately made of the property of one of the parties concerned in the adventure, for the benefit of the others, and whereby his loss is directly converted to their gain. *Stevens on Average*, part 1, chap. 1, sec. 1.

As to what is or is not liable to this contribution, depends on the laws and usage of the sea.

Among the Romans, with whom the condition of slaves was very much modified, the owners of slaves were bound to contribute for them to a general average.

Emerigon asserts the same doctrine, in his treatise on insurance, which is confirmed by the late Lord Tenterden, in his work on shipping. *Emerigon*, chap. 12, sec. 42, sec. 9. *Abbot on Shipping*, 356.

The authorities cited by Emerigon, are conclusive on the subject.

A general average contribution, arises from a sacrifice deliberately made of property of one of the parties in the adventure, for the benefit of the others, whereby his loss is their gain.

The owners of slaves are bound to contribute for them to a general average, occasioned by a jettison from the ship in which they are shipped and on board at the time.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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EDWARDS VS. NICHOLSON.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
WATTS PRESIDING.

An officer of court is liable to be *sued in any court* of competent jurisdiction for a breach of duty, or for any injury or tort committed by him in the course of his official duties.

The marshal of the United States is liable to be sued in an action for damages, in a state court of competent jurisdiction, for failing and refusing to deliver and convey to the plaintiff certain property which he purchased at the marshal's sale, made under a judgment of the United States District Court for Louisiana.

Rost, J. dissenting—Was of opinion the state courts had no jurisdiction of this case, not even of the claim for damages; that the whole subject matter belonged exclusively to the District Court of the United States.

This is an action for damages, and to compel the defendant, as marshal of the United States for the Eastern District of Louisiana, to deliver up and make a legal title to a plantation and slaves, which he adjudicated to the plaintiff under a judgment and execution of the United States District Court, on the 24th May, 1834.

The plaintiff alleges, that he has tendered the purchase money, and demanded of the defendant to deliver and execute a conveyance or title to the premises, which the latter has constantly refused and neglected to do, to his great damage of one hundred and fifty thousand dollars. He prays judgment, compelling the defendant to make a conveyance, and to deliver him a title and the possession of said plantation and slaves, and for his damages. The defendant admitted the sale and adjudication of the plantation and slaves to the plaintiff, but avers he has wholly failed to comply with the terms thereof, or to tender the purchase money.

He further avers, that in consequence of the plaintiff's failure to comply, he re-advertised the property for sale, which was ultimately stayed by an injunction. That said injunction was still pending in the United States District

Court when he went out of the office of marshal in 1835; and that plaintiff has asserted his right to his bid or adjudication in that court, and which has been denied him by a judgment rendered there, and is now a bar to this action.

He further avers that this action is malicious and vexatious, and intended to vex and harass him, by reason of which he has sustained damages in the sum of one thousand dollars, for which he prays judgment in reconvention.

When the cause came on for trial, it was suggested to the court that it was without jurisdiction, and all the evidence offered was excluded, until the question of jurisdiction was first settled. The plaintiff's counsel excepted to this course of proceeding.

The district judge was of opinion that the state courts were without jurisdiction of the matters set up in the petition; and that the United States Court alone could decide and determine whether its officer had acted properly or otherwise in refusing to make a conveyance and complete the sale by delivering title and possession to the purchaser under process issuing from that court.

There was judgment of dismissal, and the plaintiff appealed.

Hennen for the plaintiff, contended, that by the adjudication of the plantation and slaves, his right to it was perfect. This gave a legal title to the property by the operation of law, which could not be made more binding by the act of sale itself; but it was the duty of the defendant to pass an act of sale and deliver possession to the plaintiff. The state laws are binding on the United States marshal when not controlled by an act of congress. *Louisiana Code*, 691, 695. *Judiciary Act of Congress of 1789, sections 28 and 34.*

2. The marshal is liable in action for all defaults and misfeances in office, of himself and deputies. He may be sued in the state courts for trespass, tort or injury caused by him, or for any default or misfeance committed under color of his office. Even a sheriff may be sued in a different court than that under which he acted, for wrongfully executing

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 350. 4 *ibid*, 81. 7 *ibid*, 529.

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C. M. Conrad, for the defendant. The first question is, has the District Court jurisdiction? It is conceded, if this was an action sounding in damages for an act of misfeasance, &c. the court *a qua* had jurisdiction. But this case goes further; it claims the *specific performance* of a duty or act by the marshal in his official capacity as a ministerial officer of the United States Court, which alone can supervise and control his official acts. The plaintiff cannot have his action for damages and for a *specific performance* of an official act by the marshal. In relation to this last object of the suit, the state court is clearly without jurisdiction. The two demands are entirely inconsistent, and cannot be cumulated in the same suit, or maintained in the state courts in two separate ones. *Code of Practice*, 149. 7 *Martin, N. S.*, 403.

2. The character of the two demands are so different, that in all the other states or countries where the common law prevails, one of them would have to be sought in a court of equity and the other in a court of law; and a pendency of the one would be a bar to the institution of the other. *Story's Equity Jurisprudence*, vol. 2, pp. 25, 30.

3. The plaintiff claims damages for the *delay* in making the title, to wit: *the loss of a crop*; so that it will be perceived that these damages result from the defendant's delay in executing the act of sale. He cannot receive damages unless he receives the thing itself; for they are accessory to the refusal to perform what is required. If, therefore, the court cannot decree the specific performance of the act, by the marshal, compelling him to deliver the thing, it has no jurisdiction of a demand for damages, caused by the delay in delivering it, or the non-delivery.

Eustis, J. delivered the opinion of the court.

The plaintiff alleges that at a public sale made on the 24th of May, 1834, the defendant, marshal of the United

States for the Eastern District of Louisiana, sold to the petitioner, the last and highest bidder, a certain plantation and slaves for the sum of thirty thousand and one dollars; that though the purchase money has been tendered by the plaintiff to him, the defendant, as marshal, he has refused to convey or deliver to him the property purchased, though often requested, to the damage of the plaintiff one hundred thousand dollars; that he had thereby lost the benefit of two crops, and that his damages during the last year by reason of the premises, amount to the sum of fifty thousand dollars. The plaintiff prays that the defendant, John Nicholson, be decreed to deliver up and convey to him the plantation and negroes thus sold, on the payment of the purchase money, which the plaintiff is now ready and willing to pay, and that he be condemned to pay one hundred and fifty thousand dollars damages for his illegal acts in the premises. There is also a prayer for general relief. There are references in the petition which show that the property was offered for sale under process issued on a judgment obtained in the District Court of the United States for the Eastern District of Louisiana.

The judge, considering the case before him as an exception taken *ore tenus* to the jurisdiction of the court, dismissed the petition on the ground of the want of jurisdiction.

Admitting that the court of the first district has no power to compel the officer of another court to perform a ministerial act in relation to matters dependent in and cognizable by that court, it by no means follows that the officer is not liable to be sued in any court of competent jurisdiction for a breach of duty, or for any injury or tort committed by him in the course of his official duties. There might be cases where the latter court would not proceed in the suit, but await the decision of the court under the process of which the act was performed; this would be a question of comity and not of jurisdiction. We are not aware that the official acts of the marshal of the United States are entitled to any exemption from the responsibility of public officers executing the process of a court.

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An officer of court is liable to be sued in any court of competent jurisdiction for a breach of duty, or for any injury or tort committed by him in the course of his official duties.

The marshal of the United States is liable to be sued in an action for damages, in a state court of competent jurisdiction, for failing and refusing to deliver and convey to the plaintiff certain property, which he purchased at the marshal's sale, made under a judgment of the United States District Court for Louisiana.

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It is said that the action for damages is prescribed. Prescription was not pleaded in the court below: the cause is before us solely on the question of jurisdiction. If the plea of prescription was made in this court, the plaintiff has the right to have the cause remanded for trial upon that plea. It is, therefore, ordered that the judgment of the District Court be reversed, and the cause remanded for further proceedings; the appellee to pay costs.

Rost, J., dissenting.—I think with the district judge, that he could not entertain jurisdiction of this case, even for damages, unless the plaintiff had alleged in his petition that the District Court of the United States had ordered the defendant to make the conveyance and delivery, and that the defendant refused to do so.

Without this allegation, the marshal must be presumed to have done his duty. Whether he has or has not, is a matter between him and the court to which he belongs, which I conceive we have no power to determine in any case. We must hold him to be the organ of the court, until that court decides that he has ceased to be so.

Under this view of the situation in which the defendant stands, I cannot separate the officer who obeys and executes orders, from the court which gives them. His acts and his omissions are the acts and omissions of the court. The refusal of the marshal in this instance to make a sale and delivery of the property in controversy, is the refusal of the District Court of the United States to cause that sale and delivery to be made. That refusal cannot subject the defendant to an action of damages.

The District Court of the United States, having first taken cognizance of the suit under which the property was sold, has exclusive jurisdiction of all proceedings arising therein; and the *title* and *delivery* of the property sold under execution, are proceedings in the suit. *M'Kim vs. Voorhees*, 7 *Cranch*, 289. *Wayman vs. Southard*, 10 *Wheaton*, 1.

If the remedy afforded to the purchaser is not as complete as it would be under a sheriff's sale, the difference arises from

the peculiar organization of the federal judiciary, and all considerations of occasional private loss, or inconvenience on account of its insufficiency, must give way to the paramount reason of state, which requires that the two jurisdictions should be kept distinct and separate.

I am of opinion that the judgment of the district court ought to have been affirmed.

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HERNANDEZ ET AL. vs. BABCOCK'S EXECUTORS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where a merchant ordered a shipment of articles in Havana, to his house in New-York, and was privy to selecting and making up the invoices, he cannot afterwards object to the quantity of any of the articles composing them.

So, if the shipper furnished false invoices to the consignee, for part of the cargo, with the privity of the buyer, when the true ones were sent with the bills of lading, it cannot affect the validity of the contract between the shipper and buyer.

But where a contract grows out of, and is connected with an illegal or immoral act, or is in part only connected with the illegal consideration, and growing immediately out of it, though it be a new contract, it is equally tainted, and a court of justice will not lend its aid to enforce it.

11 *Wheaton*, 258.

A merchant ordered a shipment of colonial articles of produce from Havana, to his house in New-York, and to draw on it for reimbursement. The shipper consigned the cargo to a special agent, with directions not to deliver it to the consignee, unless the bills were accepted and their payment secured, but to sell it on *his* (i. e. the shipper's) *account*; and the cargo was thus *sold at a loss*: *Held*, that the buyer was bound for the *loss and charges*; as his house neither accepted the bills, or offered any security for their payment, when notified of the arrival of the goods.

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This is an action instituted in the Court of Probates against the executors of the estate of the late Henry Babcock, to recover the balance of an account amounting to one thousand six hundred and seventy dollars, on an adventure of goods, ordered by Babcock while in Havana, in 1834, to a mercantile house, in which he was concerned, in New-York.

The plaintiffs furnished and shipped the goods, in obedience to the following letter :

“Havana, 6th February, 1834.

“Gentlemen—Desirous of making an experiment of the New-York market, for some articles of the produce of your island, I agree to the terms of doing business for me, which you have proposed, say two and a half per cent. for purchasing, and one and a half per cent. for drawing ; and now authorize you to take up a vessel for me, and load her for New-York, with three to three hundred and fifty hogsheads molasses, one hundred and fifty boxes of sugar, forty or fifty thousand segars, and a few boxes of sweetmeats, consigning the same to my friends, Messrs. Roman Watson & Co., of New-York, and giving them timely advice for insurance. For your reimbursement for the cost of said cargo, you will please draw at sixty days sight on said gentlemen, to which effect, I have this day given you a letter of credit for them.

“Very respectfully, &c.,

“HENRY BABCOCK.”

In compliance with this letter and order, the plaintiffs made up a cargo and shipped it per the brig Francis, to the address of Messrs. Roman Watson & Co., New-York, and filled up the bills of lading and invoices, to order, and enclosed them to W. W. Russell, Esq., with directions “not to hand them over, unless Watson & Co. were willing to accept their drafts, and he *considered them perfectly good to pay said drafts at maturity ; and if not, to dispose of the cargo for our (their) account*, on the best terms you can, and as your good judgment may dictate.”

When the vessel and cargo reached New-York, in the spring of 1834, the house of R. Watson & Co., was laboring under the pressure of the times, and had suspended payment.

On being notified of the arrival of the cargo, they made no proposition to receive the goods, and refused acceptance and payment of the drafts. The articles were sold by Russell, the agent, as instructed, and the net proceeds deducted, leaves a balance still due on the shipment, of one thousand six hundred and seventy dollars, for which judgment is prayed.

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The executors resisted payment. It was proved that Babcock was, at the time he ordered the goods, a member of the New-York house.

The plaintiffs had judgment for the sum of one thousand three hundred and fifty-nine dollars, *with interest*, and the defendants appealed.

L. Peirce, for the plaintiffs, insisted on the affirmance of the judgment below, with *interest*. The plaintiffs were the mandatories of Babcock, and made advances and took up bills on his account. The *Louisiana Code*, article 2994, expressly says, "If the attorney in fact (or mandatory) has advanced any sum of money, for the affairs of the principal, the latter owes the *interest of it*, from the day on which the advance is proved to have been made."

T. Slidell, for the defendants, contended that the conduct of Hernandez & Co., in changing the destination and consignment of the cargo, placing it in the hands of Russell, and ordering him to sell it at his own discretion, for their account, was a stoppage in transitu, and rescinded the whole contract; that in the said proceedings, Hernandez & Co. could not be considered acting as Babcock's agent, but adversely to him, and in the character of vendors.

2. That even if the plaintiffs could be considered as stopping the goods and changing their destination for Babcock's benefit, and as his agent, they should have instructed Russell to wait Babcock's orders, and not, as they did, to sell the same for plaintiff's account.

3. The plaintiffs have exceeded defendants written order, which was to ship from forty to fifty thousand segars, whereas they shipped ninety thousand.

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4. It is not shown that the amount charged in the invoices was the price actually paid by plaintiffs, in purchasing for Babcock's account; at the most, it would seem that the value of the goods merely is shown.

5. It appears that Hernandez & Co. made up the invoices below value, (or sham invoices,) to defraud the revenue of the United States. It does not appear whether Babcock was party to the fraud; but in either case, a contract tainted with such circumstances, cannot form the subject of a claim before a court in the United States.

6. The decision of the judge of Probates is erroneous, in allowing interest on an unsettled account.

7. It has been expressly decided, that judgment cannot be given for *interest*, on an unliquidated demand; not even to run from the date of judgment. See two cases in 4 *Louisiana Reports*, 129, 140.

Eustis, J., delivered the opinion of the court.

In Havana, on the 6th of February, 1834, the deceased, Henry Babcock, gave an order to the plaintiffs, merchants in that place, to make a shipment of certain articles of colonial produce, to Roman Watson & Co., of New-York, and to draw on that firm for their reimbursement.

The shipment was made, but the plaintiffs, from the state of things in New-York, entertaining some doubts as to the solvency of the consignees, had the bills of lading made out to the order of the shippers, and sent them to Mr. Russell, a merchant of New-York, with instructions not to deliver them to the consignees, unless they would accept the drafts which had been drawn on the shipment, and unless he, Russell, "should consider the house perfectly good, to pay said drafts at maturity."

Roman Watson & Co., had previously failed, and Russell having communicated to them his instructions, and notified his intention to abide by them, no security was offered to him, except the guarantee of the house of Roman Watson & Co. Russell sold the shipment and paid the bills which had been protested for non-payment and non-acceptance.

The loss on the shipment and the incidental charges, form the subject of the present suit.

The evidence shows that the deceased was a partner in the house of the consignees in New-York, and from his presence and agency in relation to the business in the Havana, preparing the invoices, and his advising the consignees of the shipment, we think his representatives are precluded from making any objection as to the quantity of any of the articles composing it.

It is objected by the counsel for the defendants, that the plaintiffs ordered Russell to sell the shipment on *their account*. This is a matter exclusively between the plaintiffs and their agent. They were not bound to part with the property, after the failure of the consignees, unless the bills were provided for, and the only interest the plaintiffs had in the shipment, was that it should be fairly sold according to the custom of merchants, and on this ground, no objection has been made to the mode in which Mr. Russell closed the transaction.

It appears that the plaintiffs had forwarded to the consignees, a false invoice for a portion of the sweetmeats which formed part of the shipment, which were to be used or not, as they should think proper. The genuine invoices were sent with the bills of lading, and there is nothing in this naked fact to which the deceased was not privy, and which was entirely without consequence, which can affect the validity of the contract originally made between the parties.

The principles on which contracts are affected by an illegal or immoral object, do not touch this case. See *Toler vs. Armstrong*, 11 *Wheaton*, 258.

We can find nothing in the conduct of the plaintiffs throughout the transaction, which would exonerate the estate of the deceased from his obligation to make good this loss. The shipment was made on his credit; the plaintiffs looked to him as the responsible person, and all their acts appear to have been dictated by a regard to his interests.

EASTERN DIST.
May, 1839.

HERNANDEZ
ET AL.
vs.

SABCOCK ET AL.
Where a merchant ordered a shipment of articles in Havana, to his house in New-York, and was privy to selecting and making up the invoices, he cannot afterwards object to the quantity of any of the articles composing them. So, if the shipper furnished false invoices to the consignee, for part of the cargo with the privity of the buyer, when the true ones were sent with the bills of lading, it cannot affect the validity of the contract between the shipper and buyer.

But where a contract grows out of, and is connected with an illegal or immoral act, or is in part only connected with the illegal consideration, and growing immediately out of it, though it be a new contract, it is equally tainted, and a court of justice will not lend it aid to enforce it. 11 *Wheaton*, 258.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

EASTERN DIST.

May, 1839.FRIVOLOUS
APPEALS.FRIVOLOUS APPEALS AND JUDGMENTS, AFFIRMED WITH
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MERCHANTS' BANK *vs.* MURPHY ET AL.—Suit on a promissory note. Defence, a general denial and no evidence to support it. Plaintiff proved his demand and had judgment. The defendant appealed, and judgment is affirmed with the maximum of damages, as a frivolous appeal.

BEATTIE *vs.* FLORANCE.—Action on a bill for work and labor done; and the case depends entirely on the credit to be given to a witness, which is deemed correctly decided. Judgment affirmed.

DAVID & MOSS *vs.* NOLA & ROUSSEAU.—This is an appeal from the *dismissal* of an appeal taken from the City to the Parish Court of New-Orleans. The record comes up without evidence or statement of facts, and the appeal to this court is dismissed with all costs.

LAMPRE *vs.* KOKERNOT ET AL.—Judgment affirmed with damages.

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OF THE

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2. In the oath or affidavit for the arrest of a debtor, the affiant must swear from his *personal* and direct *knowledge*, that the debt is due and unpaid, and not from what he may have learned from others.
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3. The agent of the creditor must swear to the indebtedness of the defendant from personal and direct knowledge, to obtain an order of arrest, and not from what he may have heard from any other person whatever.

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4. A debtor who is about to absent himself from the state, even for a limited time, may be held to bail, if he leaves no property in the state.

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5. So, where the defendant was captain of a steam-boat, trading to Havana, was about leaving on a regular voyage, to return immediately: Held, that he was liable to arrest at the suit of a creditor, when it was not shown that he owned or possessed any property..... *ib.*

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1. Where the endorser sues the maker of a note not yet due, it is not a proper case for attachment, as he does not show an existing debt due to him by the defendant, nor an absolute liability incurred as surety.

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2. Where an attaching creditor swears, that the sum of two thousand three hundred and fifty dollars, besides interest, damages, &c. is due and owing to him, he will be required only to give bond for an amount exceeding by one half the principal sum due, disregarding the interest and damages, as too indefinite..... *Pope et al. vs. Hunter*, 306

3. Where the petition claims a larger sum, by annexing a fixed rate of damages and interest, than that sworn to in the affidavit, on which the attachment had been obtained, it does not vitiate the attachment..... *ib.*

4. The affidavit necessary to obtain an attachment for a debt not due, must be special, according to the act of 1826; and the creditor, or his agent must swear, that the debtor is about to remove his property out of the state before the debt becomes due..... *Crooke et al. vs. Rutherford and Metcalf*, 479

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2. An attorney or curator ad hoc, appointed to represent an absent defendant, has no capacity or authority to waive prospectively in behalf of his client the production of legal evidence, and he cannot bind him by agreeing to dispense with the forms required by law in taking evidence.

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3. The authority of an attorney at law extends to all the means necessary to protect and promote the interest of his client, so far as they are affected by the proceedings in court; but he cannot enter into an agreement with the members of the bar not to try causes for a certain time, which

would be binding on his client and preclude him from having his cause set for trial by employing other counsel.

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4. An agreement among counsel that they will not try causes during the summer and early fall months, is not *legally binding* on the parties to it. If a cause is afterwards set for trial by the original counsel at the instance of the client, the court will disregard his general promise, and allow him to proceed..... *ib.*

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3. Combination at auction sales to enhance the price by false bids, or depress it by false assertions, are artifices which invalidate the contract, when practised by those who are parties to it..... *ib.*

4. The owner of property may withdraw it before the highest bid is accepted by the auctioneer, but he has no right to bid himself, unless he publicly reserves this right; still less can he bid through the auctioneer..... *ib.*

5. So, where the price of property was limited, which fact was not communicated to the bidders, and the auctioneer advanced on the bid until it reached the limits prescribed by the owner, and was adjudicated to the defendant: *Held*, that the sale was null and void, even as to the purchaser. *ib.*

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1. The possession of a promissory note, endorsed in blank, is *prima facie* evidence of property sufficient to throw the burden of proof on the defendant; and when the signature is not denied, the plaintiff is not bound to make proof of it.....*Burns vs. Haynes et. al., 12*

2. The certificate of protest of the notary is required to make mention of the demand and of the manner of *making it*, and is evidence of the matters it contains; but is *not evidence* of the acknowledgment of the party to pay the debt in a particular description of notes.

Maccoun vs. Aichafalaya Bank, 342

3. An endorser cannot attach property of the maker of a note not yet due, on the ground that he endorsed as surety, and that the latter is about to remove with his property permanently from the state before the note becomes due.....*Taylor vs. Drane, 62*

4. The maker of a note has an interest to show that his vendor handed it over to the payee and endorsers, to sue as a *bona fide* holder, and deprive

him of his plea of failure of consideration. He has a right to interrogate the plaintiff on oath if he is the true owner, and to have the case remanded for this purpose, if it has been refused.....*Phillips vs. Carr*, 71

5. Where defendant sets up an equitable defence to his note, and charges fraud in the transfer of it to the plaintiff, to deprive him of his defence, the burden of proof of consideration, and that he came fairly by it, rests on the latter. The form of transfer makes no difference, whether by blank or special endorsement.....*Morgan vs. Yarrowborough*, 74

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7. In an action for the recovery of a lost note, when the fact of the loss is proved, the defendant must show that he came in possession of it in the regular course of trade, and that he acquired it in good faith and for a valuable consideration.....*Nicholson, tutor, &c. vs. Patton*, 213

8. When a note is taken by a broker under circumstances affording reasonable grounds of suspicion, he should inquire if the party came by it honestly; and if he takes it under these circumstances, with a view to his profit, it is at his own risk..... *ib.*

9. The plaintiff may strike out his own endorsement on the bill at the trial.....*Banks vs. Brander et. al.*, 274

10. The acceptor of a bill is bound absolutely, and the holder is not required to sue the drawer or endorsers..... *ib.*

11. Bills of exchange, payable after date, are not required to be presented for acceptance, as between the holder and endorsers; it is only necessary to have bills payable after sight presented for acceptance to give them a date.
Crosby vs. Morton et. al., 357

12. Endorsements made by a partnership on a bill of exchange, bearing date about three weeks before the dissolution of the firm, will be presumed to have been made during the continuance of the partnership..... *ib.*

13. Where certain notes payable at the "Branch of the United States Bank at Natchez," are protested by a notary residing at Natchez, who states in his protest that he demanded payment at the "United States Bank," it will be considered as meaning the branch at Natchez, and not the principal bank at Philadelphia... ..*Thatcher vs. Goff et. al.*, 360

14. The holder of a note endorsed in blank, may institute suit in his own name, whether he be the true owner, or the note has been put into his hands for collection.....*Boswell vs. Zender*, 366

15. A note endorsed in blank cannot be distinguished from one payable to bearer, which may be put in suit by any one in possession, when there are no allegations that it was lost or stolen, or that the possessor came by it unfairly..... *ib.*

16. Where an endorser of a bill has not received notice of protest, but

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Bank of the United States vs. Ellis, 368

17. An acceptance for accommodation of the drawers of a bill of exchange is essentially a credit given to them, and they cannot be made liable to the suit of the acceptors before maturity or payment of the bill.

Groning et. al. vs. W. & L. Krumbhaar, 402

18. The obligation of a drawer of a bill is fixed by the non-acceptance, protest and notice; and it is immaterial whether any demand and protest for non-payment was made or not.....*Williams vs. Robinson*, 419

19. A subsequent promise to pay a bill or note, or a part payment thereof, must be made with a full knowledge of the fact of a want of due diligence on the part of the holder in giving notice of protest to the parties, in order to be binding; but affirmative proof of this knowledge is not required. It may be inferred from circumstances..... *ib.*

20. Bank notes when presented at the bank and payment is refused, become mere evidence of debt, fluctuating in value according to the credit of the bank, and are fit objects of trade and commerce. Trading in them is not putting them in circulation *anew*, so as to do away with the original demand and the effect of non-payment..... *ib.*

21. Damages allowed on the return of protested bills, include all charges, such as premium, cost of protest and postage. The holder cannot claim the difference of exchange, but he is entitled to interest on the damages from the date of protest.....*Robert & Williams vs. Commercial Bank*, 528

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Loddell vs. Bullett, 348

2. So, where a steam-boat was destitute of a yawl and of ropes to throw to the assistance of persons falling overboard: *Held*, that the owner is liable for the value of a slave of one of the passengers, who fell overboard and was drowned; the officers and crew using no exertions to save him... *ib.*

3. Partnerships or unincorporated companies for the purchase and sale of personal property, and for carrying it for hire in ships or other vessels, are commercial partnerships, and the stockholders are bound *in solido* for the debts of the company.....*Vigers et. al. vs. Sainel*, 300

4. Owners of steam-boats carrying freight and passengers are commercial partners; and in liquidating the partnership affairs, when some of the partners are insolvent, the other partner cannot withdraw his share of the proceeds of the sale of their steam-boat until the partnership debts are first paid..*Claiborne et. al. vs. Their Creditors*, 279

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1. The repeal of the Roman, Spanish and French civil laws, in the article 3521 of the Louisiana Code, and the repealing act of 1828, only embraces the positive, written or statute laws of those nations and of this state, such as were introductory of a new rule; and did not abrogate the established principles of law settled by the decisions of courts of justice.
Reynolds vs. Swain et al., 193
2. The principles settled in the case of *Christy vs. Casanave*, 2 *Martin*, N. S., 451, making tenants who abandon their leases *liable at once*, for the rent of the whole term, although drawn from the Roman civil laws, which have no intrinsic authority here, yet the reason of them has great cogency in the elucidation of principles applicable to analogous cases..... *ib.*

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Ellis vs. Prevost et al., 230
2. The Code of Practice was framed exclusively with a view to judicial proceedings, and its provisions on the subject of general laws do not necessarily repeal those of the Louisiana Code, that are contrary to or inconsistent with them.....*Same Case*, 237

COMMISSIONERS FOR OPENING STREETS.

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3. The power of the husband over the wife, and her capacity to sue, ratify or make a contract, is fixed by the law of their domicil. PAGE

Garnier vs. Poydras, 177

4. So, where the wife resides in France, and is separated in bed and board from her husband, in order to sue and enforce her legal rights in Louisiana, she must be *authorized* according to the laws of France to institute suit. *ib.*

5. Where a debtor absconded from his creditors in France, came to Louisiana, and soon after died, where his succession was opened and administered: *Held*, that no other domicil but his original one in France, can be assigned him, as he manifested no intention of establishing himself here.

Gravillon vs. Richard's Executor, 293

6. The power of our courts to order the remission of funds belonging to a foreign succession opened here, to the representatives of, and creditors authorized to receive them, by the courts of the domicil of the deceased is undoubted, and every motive of public policy requires such transmission for distribution..... *ib.*

CONTRACTS.

1. In commutative contracts, it is the duty of the party claiming damages for non-performance to show that he offered to perform his part at the time implied in the contract, and that he has put the adverse party in default. This is a pre-requisite to the recovery of damages.

Vance vs. Tourné & Beckwith, 225

2. The damages occasioned at the time of the default or breach of the contract, are the only damages that can be recovered..... *ib.*

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Shepherd et al. vs. Hampton, *ib.*

4. In a contract of sale of a plantation and slaves, in which the vendee paid four thousand five hundred dollars in cash, and on the vendor's stipulating to make a title, the 1st of January following the balance was to be paid, but on failure of the vendee to comply, the sum paid was to be forfeited to the vendor to indemnify him for the chances of a better sale: *Held*, that the contract was absolute, but no more than the sum paid could be exacted from the vendee on his failure to pay the price, and that the sum paid was forfeited *Noe vs. Taylor*, 249

5. When the resolutive condition in a contract depends on the will of either party, the contract is not dissolved of right by the happening of the condition, but its dissolution must be sued for in all cases when it embraces immoveable property *ib.*

6. Good faith in a contract is always presumed, and the court will consider itself bound to believe the contracting parties understood each other, and that the vendor disclosed the truth in relation to the thing sold, when it is not otherwise shown *ib.*

7. The acceptance of a contract need not be expressed in the instrument, or signed by the party. It results from his acts in availing himself of the stipulations in the contract *Amory et al. vs. Black*, 264

8. Although parole evidence is not admissible to prove a written contract, yet it will be received to prove acts done by the parties in execution of it *ib.*

9. Where an architect enters into a written contract in a penalty, to erect a block of brick stores and dwellings *within three months after the granite is put up*, and with a knowledge of a contract between the owner and another person to put up the granite: *Held*, that the epoch when the last granite sills were set is to be considered the time when the three months began to run, and not when the basement story was completed. *Gallier vs. Jonau, f.m.c.*, 309

10. The putting up of the granite windows and doors cannot be excluded from the contract, but must be considered part of it, when not expressly reserved by the parties *ib.*

11. Where the defendant gave up the practice of law in New-Orleans, and entered into a contract with the plaintiff, by which he removed to East Baton Rouge and took upon him the cultivation of an estate and plantation, in conjunction with the plaintiff's son : on a disagreement between the parties the contract was dissolved, and the plaintiff sued to recover possession of the estate : *Held*, that the defendant cannot recover damages for the loss of his practice in New-Orleans, as for a breach of the contract. His absence was not the consequence of a breach of the contract by the plaintiff, but of the contract itself *Williams vs. Barton*, 404

12. Damages for a breach of contract are those which are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of making it *ib.*

13. In reciprocal contracts, he who desires to comply when the other delays, must at the proper time, offer to perform his part, to put the other in default *Ornard vs. Locke et al.*, 447

14. Joint purchasers cannot be condemned *in solido* for the payment of the price *ib.*

15. A party performing his part of a contract in good faith will be allowed the full value of his performance, and such damages as he may sustain by a breach of the contract by the adverse party. *Bach vs. Lafayette City Council*, 549

16. A party must be put in default before damages can be claimed for the non-compliance of reciprocal obligations. *Armstrongs vs. Baldwin, Syndic, &c.*, 564

17. Where a contract grows out of, and is connected with an illegal or immoral act, or is in part only connected with the illegal consideration, and growing immediately out of it, though it be a new contract, it is equally

tainted, and a court of justice will not lend its aid to enforce it. 11	<i>Wheaton</i> ,	PAGE
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CORPORATION.

1. To enforce the forfeiture of the charter of a corporation, proceedings must be instituted to that effect by the state; and unless the power of instituting such proceedings be expressly delegated by law, *the state alone possesses it*; and having the power, may forbear to exercise it and waive the forfeiture.....*Atchafalaya Bank vs. Dawson*, 497
2. A charter granted by the state, does not become absolutely null, by the inexecution of the condition annexed to it. A cause of forfeiture cannot be taken advantage of, or enforced against a corporation incidentally, or in any other mode, than by a direct proceeding *instituted by the government*; because it may waive a broken condition of a contract or charter, as well as an individual..... *ib.*
3. The clause in the bank charters of this state, which declares that in case of a suspension of specie payments for more than ninety days, "the charter shall be *ipso facto* forfeited and void," gives to the state the right to claim the forfeiture, in an action instituted for that purpose; and although the bank may have forfeited its corporate life, it continued to exist as long as the state did not claim the forfeiture..... *ib.*
4. *Martin, J.*—The legislature possessed the power to remit any forfeiture that resulted to the bank charters, by the suspension of specie payments; and the exercise of that power in the act for the "relief of the banks," approved March 14, 1839, relieves them from all penalties incurred by the non-payment of specie..... *ib.*

CORPORATION OF NEW-ORLEANS.

1. The property owned by the corporation of New-Orleans, at the time of its division into municipalities, belongs to the municipality in which it is situated; but the proceeds of all sales, claims for money; rights and credits, due to it at that time, can only be claimed and sued for by the mayor and commissioners of the sinking fund.....*Municipality No. One vs. Barnett*, 344
2. So, where certain lots, situated in the first municipality, were sold by the corporation to the defendant, before the division of the city, but the terms of the sale not being fully complied with, or payment made, this municipality cannot maintain an action for the rescission of the sale and get back the property. This right can only be exercised by the mayor and commissioners *ib.*
3. The town of Milneburg, on the margin of Lake Pontchartrain, is considered to lie within the incorporated limits of the city of New-Orleans, and subject to the operation of the city ordinances and police regulations.
Milne vs. Mayor et al., 68
4. Where the act of incorporation does not expressly include the inhabitants of a certain place within the city limits, yet if they considered themselves residents within them, and enjoyed the rights of the other corporators for a long time, this will be adopted as a practical interpretation of the law as embracing and subjecting them to the police regulations. *ib.*

5. The commissioners appointed under the act of 1832, for opening and widening streets in New-Orleans, are made the sole judges of the cases in which improvements are of so general a nature as to require payment of the expenses by the whole community, or only by the owners of property in the immediate vicinity, who are specially benefited by the improvement.

Blanchet vs. Municipality No. Two, 322

6. The courts are open to any abuses of the commissioners, but the party aggrieved must administer proof of the injury he complains of..... *ib.*

7. The sale of the part of the open space or *quai*, in front of Old Levee street, was sold as *public* property, and has been lawfully alienated by the assent of the sovereign authority; for the disposition of the proceeds of the sale, in being made part of the sinking fund of the city, by an act of the legislature, is equivalent to an original authority on the part of the state to make the alienation..... *Mayor et al. vs. Hopkins et al.*, 326

8. The public space or *quai*, is, by the plan of the city, appropriated to the use of the public, and having been ever occupied as such, is a *public place*, *hors de commerce*, and cannot be claimed by an individual in a civil action..... *ib.*

9. The destination of this space as a *public place*, was made by the sovereign power, and the right to alienate or to make a change in it, whenever the public interest requires it to be done, is vested in the sovereign power, and to this the rights of front proprietors are subordinate..... *ib.*

10. Front proprietors of lots cannot prevent the sovereign authority of the state from alienating the vacant space in their front, designated as a public place, or *quai*, when the public interest requires it: their rights are subordinate..... *Mayor et al. vs. Leverich et al.*, 2 cases, 332

11. The sovereign authority in a state, can authorize the alienation of a public place, destined for public use, when from the nature of its destination, the public interest requires it..... *ib.*

12. The mayor of New-Orleans, who is entrusted with the execution of the laws for the benefit of all the corporators, has the capacity to sue and prohibit by suit, the passage or execution, by any of the municipal councils, ordinances or resolutions, contrary to the charter, and to test their legality by suit..... *Genois, Mayor, etc. vs. Lockett et al.*, 545

13. So, the mayor may maintain an action to prohibit and restrain the officers of any of the municipalities, from doing any acts contrary to the laws of the state, and in violation of the city charter..... *ib.*

COURTS.—SEE JURISDICTION.

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1. Where two persons, whose pretensions are about equal, claim to be

appointed curator of a vacant estate, the one first applying will be preferred, unless the one opposing alleges and shows a better right. PAGE

Brugier vs. Biron, 77

DAMAGES.

1. A judgment creditor is liable in damages in an action for the false imprisonment of his debtor on a *ca. sa.*, if the writ issues *illegally*; but where no malice is shown, and the party might have been easily mistaken in taking out his writ, if considerable damages are given, the court will grant a new trial..... *Escuris vs. Daboval*, 87

2. So where the creditor, without malice shown, took out his *ca. sa.* on advice of his counsel and imprisoned his debtor for twenty days, and the jury gave three thousand dollars in damages for false imprisonment, the court ordered a new trial, and said, "had there been a plea of prescription on the part of the defendant, it would have been noticed; and without expressing an opinion as to its effect, suggest that it be filed before the next trial..... *ib.*

3. In commutative contracts, it is an indispensable pre-requisite for the party claiming damages for non-performance, to show that he has performed his part of the contract, and that he has put the adverse party in default.

Vance vs. Tourné & Beckwith, 225

4. In an action for damages by the vendee for a breach of the contract on the part of the vendor, in failing to deliver the article, *its price or value* at the time of the breach is the measure of damages. 3 *Wheaton*, 200.

Shepherd et. al. vs. Hamptn. *ib.*

5. In cases where it is difficult to assess the damages sustained by the party complaining, those given by the jury, even *when high*, will be sanctioned, rather than expose the parties to the expense and vexation of further litigation..... *Loney vs. High*, 271

6. So if a party, in building a wall or house contiguous to his neighbor, by which he demolishes his building and rebuilds his walls, he is bound to exercise due care and attention, and for any neglect, he is liable to the adverse party in damages..... *ib.*

7. Damages for the breach of contract are those which are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract.

Williams vs. Barton, 404

8. In an action for damages for slanderous words spoken and uttered publicly of and concerning the plaintiff, the latter may amend, and insert an allegation of the falsity of the charges and malice on the part of the defendant..... *Mittraud vs. Delasrise*, 416

9. According to the article 907, of the Code of Practice, the Supreme Court is empowered to condemn the appellant to pay damages for a frivolous appeal, if the appellee claims them, but they cannot exceed ten per cent. on the amount in dispute, including interest.

M'Coy's Executors vs. Pritchard et. al. 428

10. So where the judgment bears five per cent. interest, the damages cannot exceed five per cent..... *ib.*

11. Damages as for a frivolous appeal, will be given when the points relied on by the appellant are untenable and frivolous.

Hubbell vs. Clannon, 494

12. Damages on protested bills of exchange are given in lieu of all charges such as premium, protest and postage. The holder can claim interest on the damages from the protest, but is not entitled to the difference of exchange.....*Robert & Williams vs. Commercial Bank*, 528

DEBTOR AND CREDITOR.

1. A principle which enables a debtor to put his creditors at defiance, and dictate to them the terms on which they are to receive a portion of their claims, is repudiated by law.....*Graves et. al. vs. Roy*, 454

2. So where the debtor, residing in Virginia, made an assignment of half his interest in a ship at sea, for the benefit of certain of his creditors, and excluded those who dissent and refuse to release him: *Held*, that such an assignment is null and void as against dissenting creditors..... *ib.*

3. It has been decided in Virginia that an assignment with a condition for a release of the debtor, would not render a deed of trust invalid, provided the debtor conveyed the whole of his property for the benefit of his creditors..... *ib.*

4. The property of the debtor is the common pledge of all his creditors, and when in failing circumstances he can make no disposition of it to the prejudice of his creditors.

Townsend vs. Louisiana State Marine and Fire Insurance Company, 551

5. So, a voluntary assignment by a debtor, which provides that a certain debt shall be paid *in full*, and the other creditors that may become parties to the act are to be paid *pro rata*, is *void on its face*, which may be treated as a nullity; and the property thus assigned is liable to seizure by the judgment creditors..... *ib.*

DEMAND.

1. The amicable demand is founded upon the presumption, that if made before suit, the defendant would pay and save costs; and where no amicable demand has been first made, if upon service of citation, the defendant complies with the prayer of the petition, the plaintiff must pay the costs. But it is otherwise if he comes into court to defend the action, and judgment goes against him.....*Amory et. al. vs. Black*, 264

2. When there is no amicable demand proved, and the want of it is specially pleaded, the judgment will not be affirmed with damages, although the appeal is frivolous.....*Florance vs. Alston*, 278

3. So, where the defendant appeared and pleaded the want of an amicable demand, but had no valid defence, he was required to pay all the costs in the inferior court after his first appearance there..... *ib.*

4. The amicable demand is admitted by the failure of the defendant to answer an interrogatory put to him to that effect.....*Burns vs. Schaumburg*, 286

DISCUSSION.

PAGE

1. A defendant who insists on the plea of discussion, must specially point out property and tender the costs. It is not sufficient to aver that the party is ready to advance the costs, and that the principal debtor has property in a particular parish.....*Banks vs. Brander et al.* 274

DOMICIL.

1. The power of the husband over the wife, and her capacity to sue, ratify, or make a contract, is fixed by the law of their domicile.
Garnier vs. Poydras, 177
2. Where a debtor absconded from his creditors in France and came to the United States, settled in Louisiana, and died here, where his succession was opened and administered: *Held*, that no other domicile can be assigned but his original one in France, as he did not appear to have manifested an intention to establish himself in Louisiana.
Gravillon vs. Richards' Executor, 293
3. The fact of a person remaining in a foreign country, without any intention of establishing himself there, does not operate a change of domicile. But as soon as the will of making a permanent establishment in the country, combined with the fact of his residence, even for a few days, fixes the domicile..... *ib.*
4. Although exiles have two domiciles, in one sense, yet as to their successions, the original domicile is regarded as the true one. In questions of doubt, the original domicile is to be considered as the true and legal one..... *ib.*
5. The courts here have the power, and it is their duty to order the remission of funds belonging to a foreign succession opened here, to the representatives and creditors authorized to receive them, by the courts of the domicile of the deceased. Every motive of public policy requires it..... *ib.*

DONATION.

1. Under the Spanish law in making donations, no particular form or clause was required; the consent of the parties, the thing given and the tradition, were sufficient. Even verbal sales and donations were permitted, when tradition followed.....*D'Orgenoy et al. vs. Dros*, 389
2. A sale without a price, or for a fictitious one, is null as a sale, but is, nevertheless, valid as a donation; provided tradition follows..... *ib.*
3. No action can be sustained on a breach of promise to make a donation.
Williams vs. Barten, 404

EVICTION.

1. A *bona fide* vendor, on eviction of his vendee, since the adoption of the Louisiana Code, is not bound to indemnify the latter for profits not made, or restore absolutely the increased value of the thing sold, above the price of the original sale..... *Bissell et ux. vs. Erwin's Heirs*, 143

2. But in cases of eviction, such increased value of the thing sold, above the price of the original sale, as the parties might have reasonably anticipated at the time of the contract, should be considered as *profits made* by the buyer, and ought, in all cases, to form a part of the damages for which the vendor is liable on his warranty.....*Bissell et ux. vs. Erwin's Heirs*, 143

3. The defendant, on eviction, will be allowed to produce evidence of the *increased value* of the property at the time of eviction, above the original price at which he purchased *ib.*

4. The vendor, when the vendee demands security against the danger of eviction, is only bound to offer a person able to contract, with sufficient property, and domiciled within the jurisdiction of the court. The purchaser, or vendee, is not entitled to demand real security .. *Cross vs. Armor*, 477

EVIDENCE.

1. It is necessary to make proof of the genuineness of an act of settlement between co-heirs, when it is offered as evidence of a sale or exchange, and also of the capacity of the heirs who are parties to it, before evidence of possession under it can be received.....*Guerin et al. vs. Bagueries*, 14

2. Evidence of the signatures to the private act of settlement among the co-heirs and their capacity, was improperly refused by the court ; because, until its genuineness was first shown, its validity and effect could not be examined..... *ib.*

3. Heirs claiming a slave by inheritance, and under an act of settlement among the co-heirs, should be permitted to offer evidence, showing that the slave made part of the inheritance under the will of a deceased ancestor. *ib.*

4. The record of a suit between others, not only proves *rem ipsam*, to wit, that such judgment was recovered, but also a sale of certain goods mentioned in it ; but it does not prove that these goods were purchased by the defendant as the consideration of the note sued on, and sold as the property of this vendor.....*Morgan vs. Yarrowrough*, 74

5. A bill of goods purchased by the defendant, is not evidence in a suit between him and the transferee, of the note alleged to have been given for the price of them..... *ib.*

6. If some parts of the evidence offered in a case are irrelevant, it affords no good ground to reject the whole. The objectionable parts only should be disregarded.....*Le Bret vs. Belsons*, 93

7. Irrelevant testimony will be disregarded in this court, but furnishes no ground for remanding the case..... *ib.*

8. It is too general an objection, to state in a bill of exception, that evidence is inadmissible ; the grounds should be stated..... *ib.*

9. Parole evidence will not be admitted to show the usual rate of interest of any particular place in this state. It is either legal or conventional, and the latter must be express, and in writing.....*Poydras vs. Delamare et al.*, 98

10. Heirship may be established by parole evidence.

Hosea's Widow and Heirs vs. Miles, 107

11. Parole evidence may be received to prove a verbal agreement in regard to the occupation and repair of certain buildings, although there be a written lease, if the agreement relates to a separate matter not contained in the lease. *Kenyon vs. Berghel, f. w. c.* 133

12. Parole evidence will be disregarded in construing a written lease; but may be received in proof of a contract posterior to the lease..... *ib.*

13. Parole evidence will be admitted to prove the handwriting of a subscribing witness to a written instrument, after every diligence has been used in vain to find him out, even without showing that he is dead, or resides out of the state..... *Thompson vs. Wilson's Executors,* 138

14. Parole evidence will not be admitted to prove a written contract, but it may be received in proof of acts done by the parties, in execution of a written contract..... *Amory et al. vs. Black,* 264

15. The record and judgment of a suit between other persons and the plaintiff, are not admissible in evidence, except to show that such judgment was rendered; but the parole evidence on which it was obtained cannot, because it forms part of the record, be received as proof in another suit.

Baptiste, f. w. c. vs. Soulie, f. w. c. 268

16. The certificate of the governor, that a justice of the peace before whom certain testimony was taken on commission, was commissioned as such at the time, is insufficient to authenticate the evidence, or a document which the governor never saw, and was ignorant of its existence.

Edmondson vs. Mississippi and Alabama Rail Road Company, 282

17. Parole evidence is admissible to prove a boundary line, recognized by the parties in support of a plea of prescription; with this limitation it goes merely to prove a fact connected with the actual possession of the party.

Blanc vs. Duplessis f. m. c., 334

18. The attestation of the governor under the great seal of the state, is the best evidence of a justice of the peace's capacity, next to his commission; and where proof of his signature is not required, or is admitted, the governor's certificate, although not annexed to the return of the commission, is full evidence of his official capacity..... *Thatcher vs. Goff et al.,* 360

19. The certificate of the recorder of mortgages is *prima facie* evidence of the matters it contains. It devolves on the adverse party to show informalities, or that the renunciations or raising of the mortgages mentioned in the certificate are irregular..... *Cannon vs. Labarre,* 399

20. Parole evidence will not be received to show that on diligent examination of the records of the parish, no act of raising certain mortgages could be found. It is not the best evidence..... *ib.*

21. An auctioneer's certificate is admissible in evidence, even when it shows the sale of certain property was ordered by a different person than is alleged in the pleadings, when he is shown to have been the agent.

Oznard vs. Locke et al., 447

22. After the death of the auctioneer, parole proof is the best evidence of the correctness of the entries in his record book, and which the nature of the case admits..... *ib.*

23. A certificate of the collector of the customs made up from the import books of his office, stating that certain custom-house bonds were paid, is not admissible in evidence, when the provisions of the 2249th article of the Louisiana Code are not complied with by first proving the loss of the originals, &c.....*Johnston's Heirs vs. Cox's Syndic*, 536

EXCEPTIONS.

1. Where the defendant was sued on his promissory note, and averred that "the plaintiff was not the real owner, and had no right to sue:" *Held*, that this is neither a dilatory, declinatory or peremptory exception, but is considered an answer to the merits *Burns vs. Haynes et al.*, 12

2. Exceptions which come in by way of *proviso*, or in a subsequent statute, are properly matters of defence. ["So, the *proviso* in the registry act, being by way of exception from the enacting clause, need not be taken notice of in a libel to enforce the forfeiture. It is matter of defence to be set up by the party in his claim." 9 *Wheaton*, 421.]

Mathews vs. Pascal's Executor, 47

3. Bills of exception to the admissibility or rejection of evidence should state the grounds on which the party relies in so clear a manner as to enable the court to comprehend them. Inadmissibility is, perhaps, too general an objection *Le Bret vs. Belsons*, 93

4. An exception which, on the face of it, is frivolous, and puts nothing at issue, need not be set for trial, but may be dismissed on motion.

Bank of Orleans vs. Rice, 277

5. The exception of domicile should be first acted on, before swearing the jury to try the issue, if the party is desirous of availing himself of it.

Goldenbow vs. Wright, 371

6. Where the same fact is the ground of a dilatory exception and also of the merits of the action, it must be acted on in the trial of the cause; otherwise the fact would be tried summarily, and could not be submitted to a jury *Hobson & Co. vs. Whittemore et al.*, 422

EXECUTORS.

1. Where the executor refused to deliver up the estate of the testator to the widow, as natural tutrix of the minor children and heirs, on account of the danger to be apprehended from waste and dilapidation she might occasion the estate: *Held*, that in case of real danger, the legal way to avert it is by provoking the removal or destitution of the tutrix.

Clague's Widow vs. Clague's Executors, 1

2. The widow, as tutrix of her children, who are forced heirs of the testator, can at any time take the *seizin* from the testamentary executors on offering them a sufficient sum to pay the moveable legacies..... *ib.*

3. The dispositions in a will, in which property of the estate is to remain in the hands of executors until the testator's children or heirs arrive at the

- age of majority, cannot be distinguished from one that would authorize the executors to keep and preserve it for, and return the estate to them, which is a *fidei commissum*, or trust, and is forbidden by law..... *ib.*
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- Clague's Widow vs. Clague's Executors*, 1
4. The testator has not the power to extend the period of the executorship to more than one year; nor to direct that the estate should remain in the hands of the executors afterwards; or that they should keep and preserve it for another or others, when there are forced heirs who are present. *ib.*
5. Where an executor's account was rendered in 1804, and appears to have been communicated to the adverse party without objection, or any proceedings had in relation to it, until 1820, it was presumed to have been acquiesced in, and the court adopted it as the basis of its judgment, being the safest mode of doing justice between the parties.
- Hodge's Heirs vs. Durnford's Curator*, 187
6. An extra-judicial settlement of an estate between the executors and heirs, when the parties are all of age and under no disability of contracting, is perfectly valid, and rests necessarily on the same footing as any other convention..... *ib.*
7. In an action by the heirs of the testator, the homologation of the executor's account is no bar to the introduction of evidence to show that the executor had received funds for which he had not accounted, or failed to put in any previous account, when it is offered before he is discharged.
- Johnston's Heirs vs. Cox's Syndic*, 536
8. In case of uncertainty as to the amount due, the executor cannot complain, as it was his duty to have prevented this by rendering a correct account of his administration..... *ib.*

EXECUTORY PROCEEDINGS.

1. Where certain notes were given in payment of the price of property, which in the act of sale are identified with the mortgage retained, and described as being *to the order of C. H.*, but it is not stated that they were *endorsed by C. H.*: *Held*, that the mortgagee or transferee cannot proceed by the executory process against the property to enforce payment of the notes. The endorsement is a matter *en pais* of which the act furnishes no proof..... *Dakin et al. vs. Ganahl et al.*, 512
2. Where an act of pledge transfers to the pledgee all the pledgor's rights and interest to certain notes secured by mortgage, subrogating him to all his rights of proceeding by the executory process to enforce payment of the notes, the pledgee may have his order of seizure and sale in the same manner as the pledgor could have had..... *Armstrongs vs. Baldwin, Syndic, &c.*, 564

FACTORS.

1. Factors and commission merchants cannot claim a lien or privilege on goods, moneys or property for a general balance of account against the owner, over an attaching creditor.... *Gray, Durrie & Co. vs. Bledsoe et al.*, 489

2. The only privilege a factor or commission merchant has, is expressly given by article 3214, of the Louisiana Code, and is limited to specific advances made on goods consigned after they have come into his possession, or he has received a bill of lading, or letter of advice that they have been despatched to him.....*Gray, Durrie & Co. vs. Bledsoe et al.*, 489

3. When a merchant ordered a shipment of articles in Havana to his house in New-York, and was privy to selecting and making up the invoices, he cannot afterwards object to the quantity of any of the articles composing them*Hernandez et'al. vs. Babcock's Executors*, 587

4. So, if the shipper or factor furnished false invoices to the consignee for part of the cargo, with the privity of the buyer, when the true ones were sent with the bills of lading, it cannot affect the validity of the contract between the factor and buyer *ib.*

5. A merchant ordered a shipment of colonial articles of produce from Havana to his house in New-York, and to draw on it for reimbursement. The factor or shipper consigned the cargo to a special agent, with directions not to deliver it to the consignees unless the bills were accepted, and their payment secured, but to sell it on *his* (i. e. the shipper's) *account*, and the cargo was thus sold *at a loss*: *Held*, that the buyer was bound, for the *loss and charges*, as his house neither accepted the bills or offered any security for their payment, when notified of the arrival of the goods *ib.*

GARNISHEES.

1. The refusal or failure of garnishees to answer interrogatories concerning property of the defendant attached in their hands, is to be taken as a legal confession of sufficient property in their possession to satisfy the attachment, and to bring the defendant into court..

Parnely et al. vs. Bradbury, 351

2. The law does not require an order of court to the garnishee, directing him to answer interrogatories; the service of a copy of the petition containing the interrogatories and citation, are a sufficient warning for him to answer *ib.*

3. Where garnishees were asked if they had property of the defendant in their possession, and whether it was worth a *certain sum*, and they answered categorically, "Yes, one hundred and four bales of cotton:" *Held*, that they could show, when called on by the plaintiff to pay the proceeds over in satisfaction of his judgment against the defendant, that the cotton was previously attached in their hands at the suit of other creditors.

Robeson et al. vs. Mississippi and Alabama Rail Road Company et al., 465

4. *Eustis, J.*, dissenting.—Where garnishees, by their answer, acknowledge that they have property in their possession belonging to the defendant sufficient to satisfy the plaintiff's debt, they should not be allowed afterwards to defeat this acknowledgment, when called on to pay the plaintiff's judgment, by pleading that the property had been *previously* attached .. *ib.*, 466

5. On an appeal from an order making a rule absolute, requiring gar-

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- nishees to pay money and effects due by them to the defendant over to the sheriff, subject to the order of court: *Held*, that no answer to the rule in writing is required. Their liability is to be tested by their answer to interrogatories.....*Oakey et al. vs. Mississippi and Alabama Rail Road Co. et al.*, 567
6. An attaching creditor cannot compel the garnishee to pay a debt due by him, as such, into court, even after judgment against the defendant..... *ib.*
7. The order in which previous attachments are to be paid must be first ascertained before the last attaching creditor can obtain judgment against the garnishee *ib.*

HUSBAND AND WIFE.

1. The power of the husband over the wife, and her capacity to sue, ratify, or make a contract, is fixed by the law of their domicil. So, where a married woman residing in France, and separated in bed and board from her husband, seeks to annul a transaction made by her agent in Louisiana, on the ground that she was *unauthorized* to cause it to be made: *Held*, that the controversy must be determined by the laws of France and not those of Louisiana, where she seeks to enforce her legal rights.

Garnier vs. Poydras, 177

2. A transaction entered into by a woman separated in property from her husband, in order to be binding and valid, under the laws of France, an *authorization* from the court or her husband is necessary..... *ib.*
3. In France a separation from bed and board produces the same civil effects as to the wife, as a separation in property; and in both cases her *incapacity* to contract, without the necessary authorization, or voluntarily to execute an *unauthorized* contract, continues until the dissolution of the marriage *ib.*
4. According to the laws of France, a separation from bed and board *disables* the wife from contracting, suing or ratifying a contract without the special *authorization* of the court or her husband; and this authorization must be special or *clearly result* from some act in writing for *all acts done or to be done*..... *ib.*
5. Proof of authorization under which the wife was proceeding in her suit, being insufficient, and the defendant having the right to a final decision of the case on the merits, the court, instead of non-suiting the plaintiff, remanded the cause for a new trial, and for both parties to make new proofs. *ib.*
6. *Eustis, J., dissenting*—Was of opinion that judgment of non-suit ought to be entered, as the plaintiff would not be bound by a judgment against her; and it was unjust to allow her to litigate her rights without being bound by a decision which might be rendered adversely to them..... *ib.*
7. A separation from bed and board by the tribunals of France, does not remove the wife's incapacity to sue without the authorization of her husband.....*Rapp vs. Peyroux*, 218

INJUNCTION.

PAGE

An affidavit, stating "that all the material allegations in the petition are true to the best of the affiant's knowledge and belief," is insufficient to support an injunction..... *Catlett vs. M'Donald*, 44

2. To sustain an injunction, the affidavit must be such as to subject the party to the penalties of perjury, if the facts sworn to appear to be untrue. *ib.*

3. When the affidavit is *insufficient*, the injunction must be dissolved, even if it appears from the evidence that the party would be instantly entitled to a new one..... *ib.*

4. In dissolving an injunction, not more than twenty per cent. damages can be allowed, unless damages to a greater amount *be proved*. It is not sufficient to add fifty dollars to the damages for counsel fees, which the party will have to pay..... *Wilcox vs. Bundy*, 380

5. In dissolving injunctions, interest can only be allowed on the *amount* of the judgment actually due..... *Cannon vs. Labarre*, 399

INSOLVENCY.

1. An insolvent succession, the administration of which is refused or will not be accepted by the beneficiary heirs, their agent, tutor or curator, may be surrendered to the creditors, who are authorized to appoint syndics to administer thereon..... *Baron's Widow and Heirs vs. Hodge*, 58

2. So, where the widow and tutrix of the minor children provoked the meeting of creditors of the insolvent estate of her deceased husband, abandoned the administration and appeared in the *concurso* and voted for syndics: *Held*, that she was thereby precluded from making any opposition to the proceedings previously had in the case..... *ib.*

3. The act for the relief of insolvent debtors in actual custody, requires as a pre-requisite to obtain the relief it affords, if the applicant is a merchant or trader, that he deposit in court his books and accounts, along with his schedule..... *Bell vs. His Creditors*, 199

4. Although the law does not require and cannot oblige a merchant or trader to keep books, yet to be entitled to the benefit of its provisions relating to insolvent debtors, he *must have and deposit* them in court for the inspection of his creditors..... *ib.*

INSURANCE.

1. The plaintiff established his claim for a less sum than demanded and had judgment, and the only defence was want of an insurable interest, which was conclusively proved; and judgment was confirmed.
Berthoud vs. Mississippi Marine and Fire Insurance Company, 481

2. Where there is nothing in the policy of insurance which renders the

insurers liable for the acts of the captain or officers of steam-boats, their liability for their conduct must depend on the law.

Herman, Briggs & Co. vs. Western Marine and Fire Insurance Company, 516

3. Where the testimony of the officers of steam-boats states that it is usual to take vessels in tow in their voyages up and down the river, it cannot have effect against the insurers, when there is no evidence as to the usage of insurance in such cases, or whether such a privilege is or is not stipulated in the policies..... *ib.*

4. The business of towing ships and vessels is entirely separate and distinct from all things connected with or incidental to the navigation of the river by steam-boats, or the transportation of freight and passengers..... *ib.*

5. So, where a steam-boat was lost by the conduct of the captain in attempting to proceed on his voyage with a brig in tow lashed alongside in stormy weather, and it does not appear there was any clause in the policy allowing the privilege of taking vessels in tow, or that the insurers acquiesced in this usage, the insured cannot recover of the underwriters..... *ib.*

6. Where the agent of the insured made his written application, and the rate of premium was marked on it by the secretary of the office, but not signed by him, and he expressly informed the agent that the policy would not be delivered until the premium was paid, and in the meantime the vessel insured was destroyed by fire, five days after the application: *Held*, that the contract of insurance was not complete, the premium not being paid nor the policy delivered, and the underwriters were discharged.

Berthoud vs. Atlantic Insurance Company, 539

7. No contract is complete without the assent of the parties. In reciprocal contracts it must be expressed. In this case the assent of the defendants was wanting. The proposition to insure was accepted with a condition which was never complied with..... *ib.*

8. Where the insured settled with the underwriters for a partial loss, and gave up their policy without notifying them of a claim pending in the admiralty court for salvage, which if successful would increase the loss: *Held*, that the insured cannot recover of the insurers for any further loss they may sustain on account of salvage decreed to the salvors.

Batre et al. vs. Louisiana Insurance Company, 577

9. Had the insured notified the insurers at the time of the settlement of this outstanding claim, a different case would have presented itself..... *ib.*

10. A general average contribution arises from a sacrifice deliberately made of property of one of the parties in the adventure, for the benefit of the others, whereby his loss is their gain..... *Barelli et al. vs. Hagan*, 580

11. The owners of slaves are bound to contribute for them to a general average, occasioned by a jettison from the ship in which they are shipped, and on board at the time..... *ib.*

INTEREST.

PAGE

1. Where the purchaser stipulated to pay interest annually on the price of a plantation, and there is no evidence to justify him in withholding payment, he can only be relieved by demanding the deposit of the price.
Hampton et al. vs. Barrett, 338
2. Interest will not be allowed on damages arising on protested bills of exchange. *Crosby vs. Morton et al.* 357
3. Interest cannot be allowed on an unliquidated demand.
Goldenbow vs. Wright, 371

JUDGMENT.

1. A judgment will be reversed for not containing *reasons* as required by the constitution ; but when the record enables the court to examine the case on its merits, it will render such judgment as ought to have been given by the court below. *Burns vs. Haynes et al.*, 12
2. On a motion for judgment on a bail bond against the principal and his sureties, it is sufficient to assign *as reasons* of the judgment, that "the appearance bond of the accused was called, and he failed to appear in compliance with his recognizance." *State vs. Gossin et al.*, 96
3. A judgment and verdict which are deficient in the forms required by law, will be annulled and set aside ; but when this court is in possession of all the facts and evidence to enable it to pronounce definitively in a case, it will render such judgment as should have been given in the court below on the merits. *Hosea's widow and Heirs vs. Miles*, 107
4. Where a judgment was rendered at the instance and on the prayer of the party, he cannot be allowed to open it after it is final, and have *errors of calculation*, alleged to exist to his prejudice, corrected.
Browder's Curator vs. Browder's Heirs, &c., 156
5. A judgment which assigns no reasons must be reversed ; but the Supreme Court, when the record enables it, will render such judgment as ought to have been given in the first instance. *Amory et al. vs. Black*, 264
6. The jury are the best judges of the facts submitted to them ; and unless an examination of the evidence shows error to induce a reversal, the judgment will not be disturbed. *Baptiste, f. w. c., vs. Soulie, f. w. c.*, 268
7. Where the judgment is based on the verdict of a jury, involving questions of fact merely, which appear to have been satisfactorily proved, it will not be disturbed. Informalities complained of, not sufficient to reverse the judgment, will not be noticed. *Gooding vs. Atlantic Insurance Company*, 450

JURISDICTION.

1. In an attachment case, commenced in the Parish Court of New-Orleans, where the defendant died during the pendency of the suit, and his

succession opened in a remote parish : *Held*, that the power of the court of general jurisdiction ceased, and the cause was ordered to be transferred to the Court of Probates for the parish in which the succession was opened. PAGE

Oakey et al. vs. Ducker, 375

2. *Eustis, J.*, dissenting.—Did not consider a mere auxiliary administration, in a remote parish, of the estate of an intestate domiciliated out of the state, but dying in it, leaving *moveable* property under attachment in our courts of general jurisdiction, *divested* them of that jurisdiction *ib.*

3. It is settled in most of the states, and by the Supreme Court of the United States, that a purchaser under a decree of the Orphans Court is bound to look to the jurisdiction, but that the truth of the record concerning matters within that jurisdiction cannot be disputed, and a purchaser under a decree of court is not bound to look beyond the jurisdiction.

Lalanne's Heirs vs. Moreau, 431

4. An officer of court is liable to be sued in any court of competent jurisdiction for a breach of duty, or for any injury or tort committed by him in the course of his official duties.....*Edwards vs. Nicholson*, 582

5. The marshal of the United States is liable to be sued in an action for damages, in a state court of competent jurisdiction, for failing and refusing to deliver and convey to the plaintiff certain property which he purchased at the marshal's sale, made under a judgment of the United States District Court *ib.*

6. *Rost, J.*, dissenting.—Was of opinion the state courts had no jurisdiction of this case, not even the claim for damages; that the whole subject matter belonged exclusively to the District or Circuit Court of the United States *ib.*

LAND TITLES—LAWS.

1. The act of Congress of the 20th May, 1820, grants the right of pre-emption to front proprietors, to purchase an equal quantity of land in their rear, and adjacent to their front tract, not exceeding the same, and extending not more than forty arpents in depth; provided, notice is given and payment made in two years; otherwise, the right of pre-emption shall cease and become void..... *Jourdan et al. vs. Barrett et al.* 24

2. Where back concessions or rear lands are claimed by several adjacent front proprietors, situated in the bend of a river, the surveyor general is to divide and apportion them in the most equitable manner, among such front proprietors as avail themselves of their privilege under this act, when by the converging of the side lines, there is not the full quantity for all the claimants..... *ib.*

3. But where only one front proprietor claims the privilege under the act of Congress, to enter his back lands in a bend of the river by converging lines, he is entitled to his full quantity, and the surveyor general is bound to lay it off to him. This right was contingent, and the quantity liable to

be reduced, so long as the act was in force, but it became absolute, and vested on the expiration of the act, which could not be affected by a revival of the law subsequently; nor by the operations of the surveyor general

Jourdan et al. vs. Barrett et al., 24

4. Such front proprietors as neglected or failed to enter their back concessions, before the expiration of the act, forfeited their right, and when the law was afterwards revived, it did not revive their right, to the prejudice of the only purchaser who had availed himself of the privilege..... *ib.*

5. The decision of the secretary of the treasury, approving the operations of the surveyor general, in making the apportionments among different claimants, is not conclusive upon the legal rights of the parties in a court of justice. The authority of the surveyor general to make this apportionment, is confined to cases of conflict between *different claimants under the same act*..... *ib.*

6. Where certain lots or tracts of land have been located, surveyed and patented, the surveyor general cannot make a subsequent location of another claim, so as to interfere with, or affect the location of the original survey made by his predecessor, under which the land in dispute was sold and patented..... *Slack vs. Orillion*, 56

7. A special act of Congress, granting a tract of land within certain defined and precise boundaries, is equivalent to a patent, and will hold the land against any previous claim, not located or fixed by precise boundaries. *ib.*

8. The act of Congress passed the 15th June, 1832, giving to front proprietors on water courses, the preference of entering their back lands, provides that notices of such pre-emption claims shall be entered, and the money paid thereon, at least three weeks before the public sale of the lands in the township, by the proclamation of the president; and all lands not so entered, shall be liable to be sold, or afterwards entered as other public lands. The act of the 24th February, 1835, revives this act for one year.

Thompson vs. Schlater, 115

9. So, where A enters back lands on the 18th December, 1833, after the township had been offered at public sale by the president, and B, who owned the front tract, entered the same land, as a back concession, in 1836, under the pre-emption law of 1835: *Held*, that the entry and purchase of A, divested the government of its title, and B lost his right of pre-emption, which ceased to exist after the land had been offered at public sale..... *ib.*

10. The rights acquired by a purchaser of public lands, according to the provisions of the pre-emption law, act of 1832, *are vested*, and cannot be taken from him by a subsequent act in 1835, reviving the former law one year..... *ib.*

11. Where the grantee of a tract of land, supposed to contain seventeen arpents, fronting on the Mississippi, sells the lower twelve arpents to two purchasers, (six arpents each,) with certain fixed boundaries, these will control the quantity, in case of deficiency in the whole tract.

Blanc vs. Duplessis, f. m. c., 338

LEASE.

1. A contract of lease, either verbally or in writing, made by one partner, is binding on the partnership when it appears the firm occupied the leased premises, and in which the affairs of the partnership was conducted.

Reynolds vs. Swain et al. 193

2. Where a tenant abandons the leased premises before the expiration of the lease, he is at once bound for the rent of the whole term, and may be sued, *ib.*

3. The principles settled in the case of *Christy vs. Casanave*, 2 *Martin*, N.S., 451, making tenants who abandon their lease liable at once for the whole rent, are still in force, notwithstanding the repeal of all the civil laws not found in the Louisiana Code..... *ib.*

4. Where a contract of lease stipulates that the lessee shall pay all the state, parish and city taxes, and keep the side-walks in repair, it cannot be construed to extend to the payment of the expenses of paving the street in front of the leased premises *Municipality No. 2 vs. Curell*, 318

5. When the city ordinances provide that the owners shall be taxed for the exclusive purpose of paving the streets and making the side-walks in front of their property, the lessee cannot be required to pay this expense, unless he expressly binds himself to do so in his contract of lease *ib.*

MANDATORIES.

1. Directors are not officers of a bank, in the proper sense of the word; nor have they individually any power or control in its management. They act collectively, and at stated times; and they are not mandatories, or agents of the bank..... *Louisiana State Bank vs. Senecal*, 525

2. So, where a note was discounted at the instance of one of the directors, who knew, but failed to disclose a condition on which it was given, to wit, that it should not be negotiated, nor payment exacted until certain mortgages were released: *Held*, that the bank is not to be considered as cognizant of the condition, and is entitled to recover notwithstanding it *ib.*

MINORS.

1. According to the Spanish law, minors had a legal mortgage on the property of the *sureties* of their curator *ad bona*, which existed without being registered. But since the adoption of the Louisiana Code, this mortgage is not recognized in relation to the *sureties* of curators.

Roche's Heirs vs. Grosilliere et al., 238

2. Where there is a formal decree of the Court of Probates, recognizing the necessity of selling property inherited by minors, for the payment of the debts of the succession, giving an opportunity to the attorney of absent heirs to show, that in fact no such necessity existed; the purchaser is not bound to look beyond this..... *Lalanne's Heirs vs. Moreau*, 431

3. No alienation of minors' property can take place without the advice and consent of a family meeting, and upon sufficient cause shown..... *ib.*

MORTGAGE.

PAGE

1. Under the Spanish laws as they existed in the state in 1824, a legal mortgage attached in favor of minors upon the property of the *sureties* of their curator *ad bona*.....*Roche's Heirs vs. Groynilliere*, 238

2. On the adoption of the Louisiana Code in 1825, mortgages, whether legal, conventional or judicial, are required to be recorded; and in order to preserve their evidence, the inscription of mortgages must be renewed before the expiration of ten years; otherwise their effect ceases after the expiration of that time, even against the contracting party..... *ib.*

3. Mortgages to which husbands, tutors, and curators are subjected by law, are the only ones not requiring registry by the code; but under the Spanish law there is no exception made with respect to the legal mortgage on the property of the *surety* of a curator..... *ib.*

4. So, where more than ten years elapsed after the promulgation of the Louisiana Code, before minors asserted their claim against the *surety* of their curator *ad bona*, and without the re-inscription of their legal mortgage within that time: *Held*, that the effect of the mortgage ceased, and it could no longer be enforced against the property on which it previously existed..... *ib.*

5. The article 3298, of the Louisiana Code, provides that a mortgage exists without being recorded in favor of minors, interdicted or absent persons, on the property of their tutors, curators and *others*, &c.; but this mortgage is limited by the code, and does not extend to the property of the *sureties* of tutors, curators *ad bona* &c.....*Same Case*, 247

OFFICE.

1. Where an act of the legislature creating the office of President of the Board of Public Works, provides, "that the governor, as soon as may be after the passage of the act, and every two years thereafter, shall nominate and appoint, &c., a President of the Board of Public Works:" *Held*, that the word thereafter referred to its first antecedent, to wit, the passage of the act, and that the *duration* of the office is to be reckoned every *second year* from the date of the act, and a new appointment made accordingly.

Bry vs. Woodrooff, 556

OFFICERS—SEE JURISDICTION.

PARTNERSHIP.

1. In an action by the heirs of a deceased brother, against the succession of the other, for wages as clerk of the latter, when the evidence preponderates to show he was a partner of his deceased brother, he will be so considered, and a recovery of wages as clerk, under these circumstances, refused.

Jenkins' Heirs vs. Jenkins' Curator, 102

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2. Where the heirs of a deceased partner, being of age, renew the partnership with the surviving partner, and suffer the partnership property to remain during five years under his exclusive control and management, it will be presumed they were satisfied with his diligence; and they cannot claim from his executors *profits that he might have made*, on the ground of negligence or mismanagement..... *Reynaud's Heirs vs. Peytavin's Executors*, 121
 3. In a universal partnership, under the Spanish law, the personal and household expenses of the individual partners were chargeable to the firm, however unequal they might be in amount..... *ib.*
 4. A contract of lease is binding on a partnership, if made verbally or in writing by *one* of the partners alone, when it appears the *firm* occupied the leased premises and carried on the business of the partnership therein.
Reynolds vs. Swain et al., 193
 5. Even in ordinary partnerships, the contract of one partner, made without the authority of the other, is binding on them, if it appears the partnership was benefited thereby *ib.*
 6. The owners of steam-boats carrying freight and passengers are commercial partners; and in liquidating the partnership affairs, when some of the partners are insolvent, the other partner cannot withdraw his proportion of the proceeds of the steam-boat until the partnership debts are first paid *Claiborne et al. vs. Their Creditors*, 279
 7. The proceeds of insurance on a lost steam-boat owned by several partners are partnership funds, and must be first applied to the payment of partnership debts in preference to those of the individual owners or partners *ib.*
 8. An unincorporated company, or association, formed of stockholders in the steamer Cuba, which appointed commissioners, with authority to raise money on pledge, bottomry or mortgage, and they executed their note for five thousand dollars, on the hypothecation of the boat, which was negotiated, and the holder sued the defendant alone, as one of the stockholders: *Held*, that he was liable *as such, individually*, for the amount of the note.
Vigers et al. vs. Sainet, 300
 9. Stockholders in unincorporated companies are liable in the same manner as other partnerships; and partnerships, or unincorporated companies for the purchase and sale of personal property, or for carrying it for hire in ships or other vessels, are commercial partnerships, and the stockholders are liable *in solido* for the debts of the company *ib.*
 10. Where a commercial firm signs an attachment bond as surety, the bond is not thereby vitiated, although the partnership may not be bound; for the partner who subscribes the name of the firm is in all cases bound.
Thatcher vs. Goff et al., 360
 11. Partners in joint stock companies have no action against the company, as such, except for the settlement of accounts and partition, after the association is dissolved..... *Lesseps vs. Architect Company*, 414
 12. If the company wrongfully confiscates or withholds the stock of a partner, he has an action to be reinstated in his rights, but his stock will remain subject to the debts and losses of the company, until its dissolution, *ib.*

13. Commercial partners may all be sued in the parish in which they conduct their business, although one of them resides and is domiciliated in a different parish.....*Hobson & Co. vs. Whittemore et al.*, 422

14. On the dissolution of a partnership by mutual consent, it still continues for the purpose of liquidation; and all the partners must join in a suit against any of its debtors, for the collection of debts due the firm.

Cutler vs. Cochran, 482

15. So, on a dissolution of the firm by the death of a partner, the surviving partner cannot sue without joining the representatives of the deceased one..... *ib.*

16. Where an obligation is made to a commercial firm, the partners composing it must join in the action. The debt is due to the partnership collectively, and not to one or the other of the partners, as creditors *in solido* .. *ib.*

17. An action cannot be maintained by one partner for the *use of himself and the others* when his authority to sue is expressly denied and not proved, *ib.*

PLEADINGS.

1. The plaintiff is bound to set out every fact material to his case, whether it involves a positive or a negative; but he is not required to allege the absence or non-existence of facts which might defeat his action.

Mathews vs. Pascal's Executor, 47

2. In a redhibitory action, under the statute of 1834, which presumes that a slave is a *runaway at the time of sale*, if he elopes within sixty days afterwards, it is sufficient to *allege* that the slave in question *ran away* within a few days after the sale, when the evidence shows it was less than sixty..... *ib.*

3. So, if the infliction of unusual punishment is proved, or that the slave has been in the state more than eight months, it destroys this presumption of law, that a redhibitory vice existed at the time of sale; but the plaintiff is not required to *allege* that neither of these facts existed..... *ib.*

4. But it has been held, that a plaintiff who claimed the forfeiture of a slave, on its removal from Virginia by a tenant widower, *without the consent* of the reversioner, or heir, was bound to *allege* and prove the *absence* of that consent..... *ib.*

5. It is a general rule that the negative is not to be proved, but this does not apply to a case in which a party charges another with a culpable neglect or breach of duty; for it is one of the first principles of justice, not to presume that a person acted illegally..... *ib.*

6. Where the buyer institutes his redhibitory action under the act of 1834, which creates the presumption that a slave who runs away within two months after the sale, was a *runaway* before the sale; *provided* said slave had not been in the state *more than eight months*: Held, that the plaintiff need not allege and prove this fact. It is for the defendant to show that he comes within the *proviso* as a matter of defence..... *ib.*

7. The want of the christian name of the defendant in the petition, if it be a dilatory exception, is waived by a plea to the merits.

Parmely et al. vs. Bradbury, 351

8. The original and supplemental petition are to be taken as one and the same proceeding. Any variance between a note or document annexed, and the description of it in the petition, is cured by the note or document when offered in evidence, which must govern.....*Weyman et al. vs. Cater & Crop*, 492 PAGE

PLEDGE.

1. Creditors holding certain notes in pledge, which they cause to be seized by the sheriff, on their judgment, do not, thereby, divest themselves of the possession of the pledge; although illegally seized, they are still in the possession of the sheriff, as an officer of court, subject to the right of the pledgees.....*Goodrich et al. vs. Southmayd*, 339
2. Where an act of pledge transfers to the pledgee all the pledgor's rights and interest to certain notes secured by mortgage, subrogating him to all his rights of proceedings by the executory process to enforce payment of the notes, the pledgee may have his order of seizure in the same manner as the pledgor could have had.....*Armstrongs vs. Baldwin, Syndic*, 564

POLICE JURY.

1. The construction of dikes and levees, and removal of obstructions in the beds of rivers and navigable streams, are under the exclusive jurisdiction of the police jury of the parish through which these streams run.
Sicard vs. Chits et al., 111
2. So, where the defendants, by order of the police jury of Pointe Coupée, cut away a dam and removed the obstructions in the bed, and which had been made across *Fausse Riviere*, by the plaintiff: Held, that they were not liable in an action for damages at the suit of the plaintiff..... *ib.*

POSSESSION.

1. No physical act in taking possession, is necessary under a sale by notarial act. The intention of the purchaser, which the law presumes, coupled with the power which the act of sale gives, vests the possession in him. The right is taken for the fact, and the buyer is seized of the thing corporally by the execution of the title.....*Ellis vs. Prevost et al.*, 230
2. There is but one kind of possession known to the law, which commences by the corporeal apprehension of the thing, or the signing of the title which transfers it; and continues whether or not the possessor actually occupies and detains the thing, until he be disturbed in fact or in law..... *ib.*
3. So, all possessors, who have possessed quietly and without any interruption, by virtue of one of the titles prescribed in the 47th article of the Code of Practice, for more than a year, previous to being disturbed, can maintain a possessory action; and the possession of less than one year is sufficient, in case of eviction by force and fraud..... *ib.*
4. Where a party proves actual possession to certain and fixed boundaries,

by making roads, levees and the front fences, he will hold by prescription to the extent of his boundary, against an older title.

Blanc vs. Duplessis et al. 334

5. When two possessions lap, that which is most perfect and best characterizes the right of property, is to be preferred; that which is corporeal and manifested by acts peaceable and notorious, will prevail over that which is merely intentional..... *ib.*

6. No relative nullities in titles accompanied by possession, not even those resulting from fraud, can be inquired into collaterally; it must be by direct action..... *D'Orgenoy et al. vs. Droz*, 389

7. Naked possession for more than a year, creates the presumption in the possessor, sufficient to put the right owner upon proof of his title. He must make that proof, as plaintiff, in a direct action for that purpose, and is not permitted to throw the burden of proof on the possessor, by alleging title when he is sued for a disturbance *ib.*

8. So, the person claiming to be the right owner, when sued for disturbance, cannot bring a petitory action until after judgment in the possessory one; and if he is condemned, not until he has satisfied the judgment..... *ib.*

9. A final judgment has the effect to exclude any adverse possession, within the boundaries it establishes; any subsequent possession must be by enclosures, or under a new title, to avail the party.

Moore et al. vs. Pontalba, 571

10. The confirmation of a land claim is no new title, and will not avail the claimant for the possession, against a confirmation previously made by the board of commissioners, of which the claimant had notice..... *ib.*

11. Where a party purchases without warranty, and without ever taking possession under his title, he must be presumed to be cognizant of the defects of the possession and title of his vendor..... *ib.*

PRACTICE.

1. Service of both citation and petition is necessary to bring a party into court to answer, which is not waived by the defendant's exception, pleading a *misnomer*..... *Stocumb et al. vs. Bowie*, 10

2. The possession of a note endorsed in blank is *prima facie* evidence of property in the plaintiff, sufficient to throw the burden of proof on the defendant. When the signature is not denied the plaintiff is not bound to prove it..... *Burns vs. Haynes et al.*, 12

3. An exception putting at issue the capacity of the plaintiff to sue, is a matter of fact which may properly be submitted to a jury, with the other matters of defence on the merits, the whole being peremptory exceptions.

Hosea's Widow and Heirs vs. Miles, 107

4. The fact on which a continuance is asked, should be established by affidavit..... *ib.*

5. A verdict "*for the plaintiff*," without stating for what amount or object, is incorrect and should be set aside, and a new trial awarded..... *ib.*

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6. A verdict and judgment, which are deficient in the forms required by law, will be annulled and set aside; but when this court is in possession of all the facts and evidence to enable it to pronounce definitely in the case, it will render such judgment as should be given in the court below on the merits.....*Hosea's Widow and Heirs vs. Miles*, 107
7. Where the party failed to procure the necessary evidence to support his title, and the justice of the case seemed to require it, the cause was remanded for a new trial.....*Culliver vs. Garie et al.*, 137
8. Where proof of *authorization* under which the wife was proceeding in her suit, being insufficient, and the defendant having the right to a final decision on the merits, the court, instead of non-suiting the plaintiff, remanded the case for a new trial, and for both parties to make new proof.
Garnier vs. Poydras, 177
9. *Eustis, J. dissenting*—Was of opinion judgment of non-suit ought to be entered, as the plaintiff would not be bound by a judgment against her; and it was unjust to allow her to litigate her rights without being bound by a decision adversely to them..... *ib.*
10. This case involves simply a question of fact, turning upon the credibility of a witness, and the judgment of the inferior court is affirmed.
Nott vs. Botts, 202
11. When the case presents no question but one of ownership, which turns on mere matters of fact, and the evidence is multifarious and contradictory, the judgment will be affirmed.....*Young vs. Walker et al.*, 262
12. A motion for a new trial, after the expiration of three days from the rendition of the judgment, is correctly overruled by the inferior court.
Chandler et al. vs. Barker, 316
13. The defendant's counsel may require the clerk, on the cross-examination of the *first witness*, to take down his answer in writing, even when neither party desired it at the commencement of the examination.
Pilié vs. Stewart, 364
14. Where the judge refused to allow the testimony to be taken down in writing by the clerk, after the examination of witnesses had commenced, judgment was reversed and a new trial awarded..... *ib.*
15. When a suit or demand is premature, or when the obligation sued on is conditional, and its execution demanded before the condition has been fulfilled, the action must be dismissed.
Groning et al. vs. W. & L. Krumhaar, 402
16. If the defendant, on the trial, abandons title to the property claimed in the petition, but insists on his claim for damages set upon in compensation of the plaintiff's demand, and the latter permits the case to go to the jury in this manner without objection, the verdict and judgment will not be disturbed on this ground.....*Williams vs. Barton*, 404
17. The judge can disregard the testimony of witnesses if he disbelieves them, and give judgment as if no evidence had been adduced, on his own knowledge of the case.....*Howe vs. Manning's Executor*, 412

18. The acknowledgment of the father to pay the note of his son, was indirect, and failed to satisfy the district judge of his liability, and this court did not feel authorized to disturb the judgment.....*Hoffman vs. Holland*, 418
19. The sickness of a witness not summoned, and the absence of the attorney trying a suit in another court, are no grounds for a continuance or a new trial.....*Soey's Heirs vs. Soey's Curator*, 424
20. This case was remanded for the defendant to prove offsets to the note sued on, and no further evidence being offered, judgment was properly given for the entire sum*Yard & Blois vs. Syndic Srodes*, 427
21. The Supreme Court will not consider one decision alone as finally settling the jurisprudence on any given point or question of law, which is not settled by positive legislation.....*Priscilla Smith, f. w. c. vs. Smith*, 441
22. In a case of redhibition depending upon the testimony of witnesses which stands uncontradicted, and the judge *a quo* gave full faith to it, this court cannot afford relief to the appellant.....*Peyroux vs. Chasal*, 459
23. The execution of a bail bond need not be proved when it purports to have been signed in the presence, and witnessed by a person who certifies the record *as clerk* of the court; this will prove his quality or capacity as clerk in his signature to the bond*State vs. Gassin et al.* 96
24. In judicial proceedings, when the contrary is not shown or does not appear, the presumption is that they were regular.....*Hubbell vs. Clannon*, 494
25. Where the judgment expresses that it was confirmed and made final on due proof of the plaintiff's demand, it is sufficient grounds, according to the article 315 of the Code of Practice *ib.*
26. The neglect of the clerk to record the judgment cannot authorize its reversal *ib.*
27. A judgment becomes final *three days* after its rendition, although prematurely signed..... *ib.*
28. The maker of a note cannot complain that judgment was not rendered against him and the endorser *in solido*, even when they are both sued, *ib.*
29. In a petitory action on failure to show title in the plaintiff, judgment must be for the defendant*Adams, Administrator, &c. vs. Bell*, 555

PRESCRIPTION.

1. When it is shown that the defendant acknowledged the plaintiff's services were worth a certain sum, he cannot be allowed to plead prescription against any part of the claim.....*Hoffman vs. Alcheson et al.*, 476

PRINCIPAL AND AGENT.

1. Where the defendant, representing himself as agent, induces the plaintiffs to purchase an assorted cargo for his principals, which is shipped in their vessel, invoices made out for their account and risk, and a bill

- drawn on *them* by the plaintiffs for the amount, which is accepted but *not paid*: *Held*, that the agent is not liable..... *Zacharie et al. vs. Nash*, 20
2. A person who draws a bill of exchange, declaring himself at the same time to be the *agent of the drawees*, is not liable, individually, in case of non-payment..... *ib.*
3. Where the principal, residing in France, draws on her agent in this state, to pay over a certain sum of money to a third person, with the *usual* interest, it amounts to nothing more on her part, than a promise to pay the amount, with interest, at the place where the draft is payable.
Poydras vs. Delanare, 98
4. On the refusal of the agent to pay the order of his principal, the latter is alone bound, and is not entitled to notice on such refusal..... *ib.*
5. The agent having funds of his principal in his hands, and refusing to pay them over to the payee of his principal, is not individually bound. The neglect of the agent to obey the directions of his principal, does not render him liable to a third person..... *ib.*
6. Where an agent with general and special powers, is instructed to purchase three hundred hogsheads of tobacco for the London market, and without additional authority he ships ninety-nine hogsheads to New-York, on which a loss is sustained, he is answerable therefor.
Vigers et al. vs. Kilshaw, 438
7. So, where an agent acts in faith, but indiscreetly, and exceeds his instructions, he will be responsible to his principal for the loss sustained, or that results from his unauthorized acts..... *ib.*

PRIVILEGE.

1. According to the provisions of the Louisiana Code, article 3216, No. 3, those who have furnished the owners with materials for the construction or repair of an edifice, are entitled to a privilege on the building or work constructed, for the *price* of such materials..... *Andry vs. Guyot et al.*, 8
2. So, where the vendee of a lot of ground received materials from a third person, for the erection of a house on it: *Held*, that the material man is entitled to receive the *price* of the materials furnished, by *privilege*, over the vendor of the lot, to be paid from the price of the house in the hands of the sheriff, which was sold with the lot..... *ib.*

PUBLIC PLACE.—SEE CORPORATION OF NEW-ORLEANS.

RATIFICATION.

1. Where the ratification of a sale of certain proceedings is relied on, the burden of proof is on the party alleging it, and facts must be established from which the *ratification necessarily results*, when there is no positive proof.. *Rivas' Heirs vs. Bernard*, 159

2. To give validity to a contract which is merely voidable, it must be deliberately, and upon examination, ratified and confirmed by the party, to be binding on him *Rivas' Heirs vs. Bernard*, 159

RECONVENTION.

1. In an action of slander for damages, in consequence of slanderous words spoken, the defendant cannot reconvene for slanderous words alleged to have been uttered by the plaintiff against him..... *Kemp vs. Amacker*, 65

2. The demand in reconvention, in an action for slanderous words spoken, is not necessarily connected with and incidental to the principal one, as is required by law..... *ib.*

SALE.

1. Where a tract of land is sold for cash at the probate sale of a succession, and expressly declared to be subject to a lien in favor of the vendor for the original price and interest, and the purchaser bids over this amount, he is entitled to the benefit of his bid, by paying *the overplus in cash*.
Bradford vs. Dortch et al., 79

2. So, if the sum due the vendor has been seized in execution, the purchaser of the land at probate sale takes it subject to this claim, in whose soever hands it may come, when it is so declared *ib.*

3. The sale of an estate inherited by minor heirs may be made below the appraisement price, in order to pay the debts of the ancestor.
Hutchins, Tutor, &c., vs. Dodd et al., 84

4. When such sale is provoked by a creditor, and it is not shown to be necessary for the payment of the debts, but principally to effect a partition, it is null and void *ib.*

5. An act for the retrocession of certain property, signed only by the purchaser, is not binding, and has no force on the seller, until accepted by him in some legal manner *Municipality No. 1 vs. Barnett*, 344

6. If the date of a purchaser's signature to an act of retrocession be proved, it is a mere pollicitation, until signed or accepted by the other party, and ceases to have any effect the moment his capacity to accept is taken away *ib.*

7. A simulated sale, as between the parties, is absolutely null.
Hirtart vs. Roger et al., 126

8. Where the evidence establishes fraud on the part of the purchaser, the sale will be declared fraudulent and void as regards creditors, at the suit of a creditor of the original vendor..... *ib.*

9. A person who has a mere equitable interest in property is not allowed to question the validity of a sale of it, when he permitted the legal title to remain in another, and when it passed into the hands of a *bonâ fide* purchaser without notice *Doser vs. Squires & Donaud et al.*, 130

10. In sales *per aversionem*, the purchaser cannot claim diminution of price for a deficiency in measurement; but if he has been led into error by the fraudulent concealment of the vendor as to the real quantity, he is not without remedy, and will be allowed to produce evidence of fraud and concealment under the proper allegations *Lesassier vs. Dashiell*, 151 PAGE
11. Good faith is required in sales *per aversionem*, as much as in any other kind of contracts; and when fraud and concealment is alleged in the pleadings, the court should allow the inquiry to be gone into..... *ib.*
12. So, the purchaser was permitted to introduce evidence to show that the vendor knew at the time of the sale, which was *per aversionem*, that the tract of land described in the act of sale contained less than the quantity mentioned *ib.*
13. The adjudication of property held in common between the surviving parent and minor children is *alone authorized*. The separate property of the deceased parent descends to his children, and can only be alienated in the manner prescribed by law for the sale of minors' property.
Rivas' Heirs vs. Bernard, 159
14. Where the ratification of a sale is relied on, the burden of proof is on the party alleging it, and facts must be established from which the *ratification necessarily results* when there is no positive proof *ib.*
15. An agreement to sell a lot of ground, in which it is designated and the price and terms of payment specified, is a *sale*, according to article 2431 of the Louisiana Code, and the seller is bound to execute a title accordingly.
Long vs. French, 257
16. Property claimed in a suit, in virtue of a *sale*, cannot be alienated by the adverse party, pending the action, so as to prejudice the plaintiff's right, *ib.*
17. Combinations at auction sales to enhance the price by false bids, or depress it by false assertions, are artifices which *invalidate* the *sale* when practised by those who are parties to it..... *Baham vs. Bach*, 287
18. As soon as the auctioneer declares the highest bidder to be the purchaser, and the thing sold is adjudicated to him, the contract of sale is subject to the same rules which govern ordinary sales *ib.*
19. Where the act of sale contains the clause *de non alienando*, the vendor is relieved from the necessity of making the third possessor a party to the executory proceedings in asserting his mortgage against the mortgaged premises *Nicolet's Executor vs. Moreau et al.*, 313
20. The buyer, at probate sale, to whom a slave is adjudicated, cannot avoid the sale and payment of the price on the ground of the redhibitory vice of running away, without administering proof that this vice existed at or before the sale *Fortier et al. vs. Labranche*, 355
21. An agreement by the heirs to rescind a probate sale of a slave is invalid, if not made in writing; and where some of the heirs are minors it cannot be legally made in any form..... *ib.*

22. In the probate sale of a slave, to pay the debts of a succession, where the executor expressly declares he does not warrant against any of the redhibitory vices or maladies prescribed by law, the purchaser cannot avail himself of the redhibitory vice of an habitual runaway, to avoid the sale and payment of the price, even if this fact was known to the owner in his lifetime, and not declared.....*Magoffin vs. Stringer et al.*, 370

23. The price of a sale must be serious; and a price which is out of all proportion with the value of the thing sold, invalidates the sale.

D'Orgenoy et al. vs. Droz, 382

24. A sale without a price is not binding as such on the parties; but the act may have effect as a donation, if it contains nothing contrary to public order, provided the purchaser can receive a donation from the vendor, and no injury results to third persons..... *ib.*

25. It has been adopted as a general rule of law, that a sale without a price is a donation *ib.*

26. A sale without a price, or for a fictitious price, although null as a sale for want of the essential requisites of that contract, is nevertheless valid as a donation, provided tradition follows*Same case*, 389

27. It is not necessary that the appointment of appraisers should form a part of the decree, ordering the sale of property inherited by minors to pay the debts of the succession, or that their names be mentioned in the order. Their appointment may be entered afterwards on the minutes of the court. When the substantial requisites of the law are complied with, it will suffice.

Lalanne's Heirs vs. Moreau, 431

28. The decree of the Court of Probates, upon the recommendation of a family meeting for the sale of property inherited by minors, to pay the debts of the succession, is so purely *in rem.*, and against the property, independently of the persons, that the sale made under it extinguishes all the mortgages existing in the name of the owner of the property..... *ib.*

29. Sales directed by the Court of Probates are judicial sales to all intents and purposes, and the purchaser is protected by the decree ordering them *ib.*

30. It is settled in most of the states of the Union, that the purchaser under a decree of the Orphan's Court is bound to look to the jurisdiction; but that the truth of the record, concerning matters within that jurisdiction, cannot be disputed. If the facts necessary to give the court jurisdiction appear on the face of the proceedings, the purchaser need not look beyond the decree *ib.*

31. A fraudulent sale of personal property, although followed by possession, gives no right of property to the purchaser; and the true owner has his action against the latter for its recovery.....*Weld et al. vs. Dantin*, 460

32. A proprietor who divides a piece of land into lots, and offers them for sale, is not required to submit a plan of his town, for the approval of the police jury.....*Ollie vs. Ogilvie*, 472

33. So, the owner is not guilty of deception towards the purchasers of

lots when he omits to mark on his plan a *private road* which had been used to pass over his land, and which is afterwards taken for a public road. It is sufficient to designate the public road and levee existing, as such, at the time... *Ollie vs. Ogilvie*, 472

34. Where certain lots were sold in reference to a plan representing a *passage* through the square on which some of the lots were made to front, and it turned out that there was no public passage authorized by the corporation, this was held to be such an artifice or error as would avoid and annul the sale at the instance of the purchaser *Chalon vs. Pepin*, 534

SALE FOR TAXES.

1. In a sale for taxes due the corporation of New-Orleans, by non-resident owners of lots, the name of the owner must, in all cases, be given and published in the proceedings. The designation that the owner is unknown, is insufficient to make such sales valid.

Carmichael vs. Aikin's Heirs, 205

2. The debt or corporation tax due by non-resident owners of lots, must be proved, contradictorily with the attorney appointed to represent the absentee, and must be so stated in the judgment..... *ib.*

3. In a forced sale for taxes on city lots, it is insufficient to designate the lots by *number alone*, and the squares in which they are situated. The extent and boundaries should be given. *ib.*

SERVITUDE.

1. Where two estates are adjacent to each other, the one below owes to the other a natural servitude to receive the waters which run naturally from it, according to the principles settled in the case of *Martin vs. Jett*. 12 *Louisiana Reports*, 501..... *Hebert vs. Hudson & Lambeth*, 54

2. If the owner of the lower estate, owning the servitude, makes a levee or other obstruction to the natural flow of the water over his land from the upper one, the owner of the latter has his action to cause the obstructions to be removed..... *ib.*

SLAVES AND FREED PERSONS.

1. It is the duty of masters of steam-boats, as soon as a slave is discovered on board without permission, to cause him to be landed or secured.

Goldenbow vs. Wright, 371

2. So, where a slave was discovered on board without permission, soon after the defendant's boat started from the port of New-Orleans, and was allowed to be employed by the cook, without any measures being taken for securing him, and he was lost on the trip or voyage, the master was held liable to the owner for his value..... *ib.*

3. Where a slave was taken from Louisiana, with the consent of the owner, to France, although afterwards sent back here, she was thereby enti-

tled to her freedom, from the fact of having been taken to a country where slavery is not tolerated, and where the slave becomes free by landing on the French soil *Priscilla Smith, f. w. c. vs. Smith*, 441

4. When owners go out of the state with their slaves, and afterwards emancipate them, they must do so according to the laws of the place where the emancipation takes place..... *ib.*

STEAM BOATS—SEE CARRIERS, PARTNERSHIP.

SUCCESSION.

1. The succession of a *non-resident*, dying in the state, is opened in the parish where he owned real estate, or in *that* in which his principal effects are situated, if he had effects in several parishes; or in the parish where he died, if he had no immoveable property in the state.

Oakey et al. vs. Ducker, 375

2. All claims for money, must be brought in the Court of Probates, for the parish in which the succession is opened, whether the deceased had his residence in the state or out of it..... *ib.*

SURETY.

1. A surety has the right to claim an indemnification, by instituting suit against his principal, even before making any payment; *a fortiori*, when a judgment has been obtained against him, he may demand indemnification without payment..... *Thompson vs. Wilson's Executors*, 138

2. When the surety has paid *upon*, or *after being sued*, even without informing his principal debtor, he has his recourse, although the debtor was in possession of the means of having the debt declared extinct *ib.*

3. When circumstances existed at the creation of the debt which enabled the debtor to resist payment, still if he suffers his surety to remain ignorant of them, and the latter pays, he will be bound to indemnify him..... *ib.*

4. The absence or insufficiency of consideration, may be opposed to the creditor, but not to the surety, *who has paid*, or *is liable to pay*, especially when he is ignorant of such defence..... *ib.*

TUTOR AND TUTRIX.

1. The widow, as tutrix of her minor children, may be removed to avert waste or dilapidation of their property, but until destitution of office, she has a right to demand the possession of her children's estate from the executor *Clague's Widow vs. Clague's Executors*, 1

2. The widow, as tutrix of the minors, who are forced heirs of the testator, may, at any time, demand and take the *seisin* of the estate from

	PAGE
the testamentary executors, on offering them a sufficient sum to pay the moveable legacies	1
3. The creditor of a succession inherited by minors, under the tutorship of the administrator, cannot institute suit for the removal of the tutor for malversation in office. No one can institute this action, without being properly authorized by the Court of Probates, as required by the article 1016 of the Code of Practice.....	66

WARRANTY.

1. The defendant may place the plaintiff in <i>duriori casu</i> , when he exercises a legal right resulting from the action against him. Thus the plaintiffs and defendants in an execution and judgment, may be cited in <i>warranty</i> , by the purchaser at sheriff's sale, when he is in danger of eviction.....	14
2. Where a warrantor is called in by the defendant, and the sheriff's return shows that he has not been found, it is the duty of the party calling him, to use all diligence to have him cited ; or a <i>curator, ad hoc</i> , appointed to represent him, if he resides out of the state...	22
3. Warrantors need not be made parties to the appeal, when it is expressly agreed that the case shall first be tried, as between the original parties.	
<i>Beard et al. vs. Poydras,</i>	82

WILL.

1. A disposition by will, in which the property of the estate is to remain in the hands of the executor until the testator's children or heirs arrive at the age of majority, cannot be distinguished from one that would authorize the executors to keep and preserve it for, and return the estate to them ; and is a <i>fidei commissum</i> , or trust, which is forbidden by law.	
<i>Clague's Widow vs. Clague's Executors,</i>	1
2. The testator cannot extend the period of executorship to more than a year ; nor direct that the estate remain in the hands of the executors afterwards, or that they keep and preserve it for another or others, when there are forced heirs present.....	ib.
3. A will dictated in Spanish, the native tongue of the testator, and a memorandum thereof taken down in French, by the notary, which is read to the testator ; approved by him as expressing <i>his intentions</i> , and drawn up in the English language, of which the testator is ignorant, but is signed by him, the notary and witnesses, is null and void under the 1571st article of the Louisiana Code, which requires that a will should be written by the notary, <i>as dictated</i>	104
<i>Gonzales vs. Gonzales,</i>	
4. When a foreign will, duly authenticated and admitted to probate, in the country of the testator's domicil, is presented for registry in a parish of this state, and no dative testamentary executor is asked ; and it not appearing that there are any creditors, heirs or legatees, here, and the property is	

moveable, the judge of probates, in such cases, is bound to admit the registry and execution of the will, without any other form than that of registry.....*State vs. Judge Bermudes*, 221

WITNESS.

1. The father of one of the parties, called in warranty by the defendant, is an incompetent witness to testify on behalf of the plaintiff.

Guerin et al. vs. Bagneries, 14

2. The declaration of a witness on his *voire dire*, touching his interest and connection with one of the parties to the suit, are entitled to greater credit than his statements to a third person, when not under oath.

Le Bret vs. Belsons, 93

3. An agent is a competent witness for his principal in all cases, except where suit is brought against the principal on account of the negligence of the agent.....*Nicholson, Tutor, etc., vs. Patton*, 213

4. So, in an action for the recovery of a lost note, against a broker who bought it of a notary's clerk, the notary was received as a competent witness to prove that his clerk had purloined the note from his office, and sold it to the defendant, notwithstanding he was the agent with whom the note was deposited, to demand payment..... *ib.*

5. The deposition of a witness taken before a commissioner, who was twice examined and cross-examined, by the defendant, *without objection*, will not be rejected on the trial, at the instance of the latter, on the ground that the witness was incompetent to testify..... *Goldenbow vs. Wright*, 371

6. The competency of a witness, or his interest in the matter in controversy, may be ascertained by examining him on his *voir dire*; if the party objecting does not choose to do this, the party offering him may rebut the presumption of his incompetency by other evidence.

Denton vs. Commercial and Rail Road Bank of Vicksburg, 486

7. The partner of a firm, subscribed as security to an attachment bond, who was absent when the name of the firm was signed, is *prima facie*, a competent witness to testify in the case..... *ib.*

See R. T. C.

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